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REPORT ON DIVISION OF PENSIONS ON MARRIAGE BREAKDOWN

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To The Honourable Colin Gabelmann
Attorney General Of The Province Of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON DIVISION OF PENSIONS ON MARRIAGE BREAKDOWN

The division of family property between spouses on marriage breakdown has presented many questions for lawyers to deal with and the courts to resolve. One kind of property, pension entitlement, has presented particular problems. The policy of the *Family Relations Act* is clear. Pension entitlement earned during the marriage by one spouse belongs just as much to the other. But giving effect to this policy is not easy.

The variety of pension plans that exist, their highly technical nature, and the difficulties inherent in attempting to treat a stream of future income as a property right, all combine to create problems. A significant defect of the current law is that it requires economic and actuarial issues to be resolved through litigation, a process not well equipped for that purpose. This visits expense on the parties and places substantial demands on the courts.

A goal of reform is to fashion legislation in which the fundamental problems of pension division have been worked out in advance, and which will operate in a fair and straightforward manner without the need for extensive actuarial and legal advice. Achieving that goal requires the delicate balancing of the interests of the member, the spouse (who is often in a highly dependent position) and the pension plan.

We have consulted extensively on these issues and explored various means of accommodating the sometimes conflicting needs, goals and interests of these parties. Many who commented during the process of consultation felt that a scheme for pension division must also adopt as straightforward and simple a model as possible, for the benefit of those who are affected by the legislation, and the professionals representing them. This policy played a significant role in selecting among various choices that had to be made in finalizing

the details of our recommendations including our conclusion that the direct involvement of plans in the process of pension division is an essential feature of a rational legislative scheme.

Our final recommendations take the form of extensively annotated draft legislation which provides a comprehensive structure for dividing all forms of pension entitlement. It requires an entirely new approach for pension division that must, necessarily, be monitored over the initial years to ensure that it operates fairly and sensibly and that the goals of reform are met.

CHAPTER 1 INTRODUCTION

A. Overview

1. Public Concern

Marriage breakdown marks the end of both a personal and a financial relationship. Untangling either can be traumatic. Property rights that arise on marriage breakdown are particularly difficult to resolve and have generated a great deal of case law over the past decade.

British Columbia law regards a pension as being just as much a family asset as the matrimonial home.[1] A pension, however, is not as easy to divide as most other assets. At the time of marriage breakdown, a pension is usually little more than a right to receive a future stream of income. Much legal ingenuity has been invested in devising ways to divide pensions, or satisfy one spouse's entitlement to share another's pension.

One complicating factor is the complexity of pensions generally. There are different kinds of pensions which provide different kinds of options. All too often, a technique for division that works well for one kind of plan fails completely for another. As a result, the legal principles worked out by the courts are complex and not easily grasped by the public or, for that matter, all judges and lawyers.

2. Reference

Many have called for changes to the law. A number of lawyers have written to the Commission about this matter. Judges dealing with these issues have recorded in their judgments the need for revising legislation. These kinds of representations were also made to the Justice Reform Committee, which received public submissions in 1988 before issuing its comprehensive report ("*Access to Justice*") for revising the administration of justice. The Committee recommended enacting legislation that would allow a pension to be divided by the plan.[2] The Canadian Bar Association adopted a similar resolution.[3]

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1. *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 45(3)(d).
2. Recommendation 39.
3. Resolution No. 2, August 21-25, 1988, Montreal, Quebec.

In response to the call for revising the law, the Ministry of Attorney General asked the Commission for advice on directions the legislation should take.

3. Working Paper

The Commission published a *Working Paper on the Division of Pensions on Marriage Breakdown* in December, 1990. This document was produced with the assistance of expert advice. It fully canvassed the law and the various issues that have arisen in pension division. It also described options for reform and set out draft legislation describing a comprehensive scheme for pension division. The suggestions made in the Working Paper are described in greater detail in Chapter III.

4. Process Of Consultation

The Working Paper was circulated widely. Judges, actuaries, plan administrators and organizations whose members are involved with pensions received copies. Every member of the Family Law Subsections of the Canadian Bar Association (British Columbia Branch) received the Working Paper, in this way reaching almost all lawyers practising family law in the province.

Representatives of the Commission spoke at meetings of lawyers and of actuaries and met with groups organized to comment on the Working Paper. Submissions were received from all across Canada although, as is to be expected, most comment was from people located in British Columbia.

We received many thoughtful comments on our tentative suggestions and additional issues were raised for our consideration. The advice we received was invaluable and has shaped the final form of our recommendations.

This Report sets out a general summary of pension issues and problems and the tentative directions for revising the law discussed in the Working Paper. It then discusses in some detail the comment made on the Working Paper. Our final recommendations are to be found in Chapter V, in the form of annotated draft legislation and regulations.

5. TERMINOLOGY

The Working Paper adopted a few conventional terms to simplify the discussion. In particular, the spouse with pension entitlement was referred to consistently as the "member." The word "spouse" was used to refer to the one claiming a share of pension entitlement. These useful conventions are continued in this Report. Other words will be defined as the discussion proceeds.

6. RECENT DEVELOPMENTS

A complicating factor in pension division has been that, in British Columbia, a court cannot make an order that binds a pension plan. Usually, unless the plan otherwise consents, the method of division cannot directly affect the plan.[4] This part of the law, however, is slated for change.

At the same time the Working Paper was being prepared for publication, the government introduced a bill dealing with pension law called the *Pension Benefits Standards Act* ("PBSA"). It has now passed third reading and will come into force on January 1, 1993.[5] Section 63(1) of the PBSA protects a plan from being "assigned, charged, alienated or anticipated" and provides that benefits are:

> ...exempt from execution, seizure or attachment, and any transaction purporting to assign, charge, alienate or anticipate those benefits or money is void.

Other pension legislation to this effect has motivated British Columbia courts to hold that an agreement or court order *cannot* affect a plan.[6] However, section 63(2)of the PBSA says that subsection (1) does not apply to a transfer of pension entitlements on marriage breakdown:

> **63.**(2) Subsection (1) does not apply to
> (a) ...
> (b) the transfer of pension entitlements under
> (i) a separation agreement,

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4. *Rutherford* v. *Rutherford*, (1981) 23 R.F.L. (2d) 337 (B.C.C.A.); *Jennings* v. *Jennings*, (1987) 14 B.C.L.R. (2d) 232 (S.C.).
5. Parts of it (s. 26 and the provisions for the appointment of a Superintendent of Pensions and a Pension Benefits Standards Advisory Council) came into force August 23, 1991.
6. Some courts have held that legislation of this nature prevents any kind of division of the pension. *See, e.g., Smith* v. *Smith*, (1986) 1 R.F.L. (3d) 219 (B.C.S.C.); *Young* v. *Young*, (1986) 5 R.F.L. (3d) 337 (B.C.S.C.).

(ii) a declaratory judgment under section 44 of the *Family Relations Act*,
(iii) an order for dissolution of marriage or judicial separation or
(iv) an order declaring a marriage null and void.

The events listed are those commonly referred to as "triggering events" under the *Family Relations Act*.[7] A triggering event signifies marriage breakdown, and automatically vests in each spouse a half interest in family assets.[8] Section 64 of the PBSA further clarifies the ability of spouses and courts to deal with pension entitlement on marriage breakdown:

> **64.** The entitlement of any person to receive a benefit under a pension plan is subject to entitlements arising under a separation agreement or order made under Part 3 of the Family Relations Act, or a similar order of a court outside British Columbia enforceable in British Columbia, that affects the payment or distribution of a person's benefits.

It remains to be seen whether the cumulative effect of these sections will influence courts to make orders binding on plans. We are advised, however that some plans are already taking steps in anticipation of these sections coming into force, in order to deal efficiently with orders under the new legislation.

The PBSA gives no guidance on how pension division is to take place. There are as many ways of dividing a pension as there are views on what constitutes fair shares for the spouse and member. These points are underscored by case law, books and articles and the comment we received on the Working Paper.[9]

The following Chapters give some idea of how the law works now and the policies and technical issues that arise in pension division. More than ever, there is a need for legislation to provide guidelines for pension division. The PBSA goes only part way. It makes pension division at source a possibility. This Report completes the picture, by setting out how it should be done.

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7. FRA, s. 43(1).
8. *Ibid.*
9. *See further* Appendix B which discusses recent case law dealing with pensions.

CHAPTER II SUMMARY OF THE LAW DEALING WITH PENSION DIVISION

A. Introduction

British Columbia legislation provides that spouses share family assets, including pensions, on marriage breakdown. Unfortunately, the legislation does not say how pensions are to be divided. It doesn't even tell us if all pensions are divisible, or whether exceptions are to be made for special kinds of plans or benefits.

The British Columbia legislation came into force in 1979 and since then courts have addressed many issues relating to pensions. Much of the law is clearly drawn but parts of it remain unsettled.

B. Kinds of Pension Division

The two main methods of pension division do not directly affect plans.[1] Usually, a pension is divided by splitting monthly payments made under it. This is called a "benefit split." The member pays the spouse the determined share when each cheque is received.[2]

The alternative method is called a "compensation payment." The spouses do not divide the pension. Instead, a value is placed on the spouse's interest in the pension and the spouse is bought out. The payment might take the form of money or the transfer of another asset.

C. Account Splits

Some jurisdictions have added a third method of pension division, which we call an "account split." Legislation requires the plan to divide the pension *account* between the spouse and member. The plan either administers the divided account in the form of two separate pensions, or transfers the spouse's share to another vehicle (such as an RRSP or another plan) to provide pen-

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1. This is because currently, a court has no jurisdiction to make an order that is binding on a plan: *see, e.g.*, the *Rutherford* case. But this will change when the PBSA comes into force.
2. In some cases, this arrangement is made by automatic withdrawals from the member's bank.

sion benefits. In the Working Paper, we suggested that a form of account split should be available in British Columbia.

D. Problems With Pension Division

Each method of pension division presents difficulties.

There are two main problems in carrying out a compensation payment. One is determining an amount to be paid to the spouse. Compensation is ordinarily decided by accepted actuarial principles, but many valuation issues are undecided. It is unclear, for example, whether a pension should be valued at marriage breakdown based on its current value (by assuming the member ends employment on the date of valuation) or on its future value. The decision made on this one issue results in significantly different values being placed on a pension.

Apart from difficulties of valuing a pension to determine an appropriate compensation payment, many doubt the fairness of requiring the member to pay the spouse a sum of money in satisfaction of an asset that may never materialize, if the member dies before retiring. And some people simply do not have enough money to make a compensation payment.

The chief flaw of benefit splitting is the tie it maintains between the spouse and member. Spouses often find it difficult to deal with each other after marriage breakdown, so that it is unfortunate to use a method of pension division that depends upon cooperation.

Many favour a method of pension division that directly involves the plan, such as the account split mentioned above. Most of the advice we received from plans and their advisors, however, opposed this method. We were told that it was unworkable, too costly and unfair. Even so, some plans located in the province already allow for account splitting.[3] In the experience of these plans, we were told, account splitting is actually an advantage to the plan. Acrimony between husband and wife often affects third parties. For example, even though theoretically uninvolved in benefit splitting many plan administrators find themselves caught in the midst of a continuing battle over pension entitlement. A method of dividing the pension once and for all, resolv-

3. *E.g.*, the Carpentry Worker's Pension Plan.

ing outstanding disputes, is to the advantage of not only spouses but, it seems, plans as well.

The difficulty, then, is to identify a method of pension division that is fair to spouse and member and sensitive to the type of plan involved. Moreover, the method must not cause plans undue expense or administrative difficulties. These were the objectives we had in mind when the suggestions made in the Working Paper were developed. The suggestions are discussed in the next Chapter.

CHAPTER III THE WORKING PAPER

A. Introduction

The Working Paper divided pension division issues into four groups, identified by the kind of plan and the stage it is in when it is divided. Both of these ideas need some explanation.

1. Kinds Of Plans

There are two basic kinds of plans.[1] One provides a pension based on contributions made on behalf of the member, and earnings made by investing the contributions. These kinds of plans are called "money purchase plans" or "defined contribution plans."

The second kind of plan provides a pension based on a benefit formula, usually tied to the member's salary levels. Benefits might be based, for example, on the average annual income for the member's last five years of employment before retirement. These kinds of plans are called "defined benefit plans."

2. Stages Of A Pension

Pensions have three separate stages. Different issues must be resolved depending on the stage the pension is in when it is to be divided. These are the labels we use to describe the three stages: a "matured pension," a "vested pension" and a "non-vested pension."

A pension matures when the member retires. At that time, various decisions are made concerning the form of the pension. In some cases, arrangements will be made with other companies to provide benefits to the member. The plan, for example, might purchase an annuity for the member.

Before retirement, the member has only future rights. It is in this respect that "vesting" plays an important role. A person who becomes a member of a plan must maintain membership for a certain period before the pension is said to vest. When a pension vests, it means that the member is entitled to eventually re-

1. A third kind is a combination of the two basic plans and is called a "hybrid plan." The Working Paper did not deal directly with pensions in hybrid plans, but that oversight has been corrected in this Report.

ceive a pension, even if the member terminates employment immediately after vesting and well before retirement age.[2]

In the initial stages, a member has a non-vested pension. It is not clear how to value a non-vested pension, since it is not known whether the member will ever have a pension. The portion of the benefits financed by employer contributions are forfeited if the member does not complete the vesting period.

3. Four Groups Of Pension Division Issues

Bearing in mind the kinds of pensions that might be divided, and the stages of a pension's development, pension division issues fall into the four general groups mentioned at the beginning of this Chapter. Each group presents slightly different problems requiring different solutions. The legislation suggested in the Working Paper was structured to deal with each of these groups. The four groups are:

(a) pensions in plans outside the reach of a British Columbia court's order, (we called these "extra-provincial plans" to distinguish them from "local plans" which would be subject to the order of a British Columbia court),

(b) unmatured pensions in local defined contribution plans.

(c) unmatured pensions in local defined benefit plans, and

(d) matured pensions in local plans of either kind,

Extraprovincial plans: There are limits on what can be accomplished with provincial legislation. Most plans located outside the province are not subject to a local court's order. Extraprovincial plans must be divided in some way that does not directly involve the plan. The only available method is a benefit split administered by the member.[3]

Unmatured pension in a local defined contribution plan: Defined contribution plans are like deposit accounts. They consist of contributions and proceeds from the investment of the account. No guesswork is necessary to value a defined contribution

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2. In some cases, a member may elect to have pension entitlement paid out to another plan or vehicle, such as an RRSP.
3. Or a spouse's pension entitlement could be satisfied by making a compensation payment.

plan. For that reason, a share of the pension can be transferred to the credit of the spouse when other family assets are divided.[4]

Unmatured pension in a local defined benefit plan: If pension division takes place before the member retires, a number of issues must be settled. Often the interests of the member and the spouse are opposed on questions such as when to retire and the form in which the pension should be received. Conflicts like these can be resolved by dividing the pension into two accounts. The Working Paper suggested that, while the plan should be given notice immediately, the actual division would take place no earlier than the earliest date the member could have decided to retire. At that time, a spouse could ask for benefits to start under the spouse's separate account. We called this a "deferred account split." The novelty in this idea is that by the time the pension must be divided everything about it is known.[5] There is no need to place a value on the pension, or make decisions years in advance, based on guesswork.

Matured pension in a local plan: Once a member retires, various binding decisions have been made about the pension. Not only is it wrong to unsettle these arrangements because of the effect on third parties, it is unnecessary. A benefit split administered by the plan fully protects the spouse.[6]

4. A Point Form Summary Of The Working Paper Suggestions

The discussion above gives an overview of pension division. The legislation suggested in the Working Paper was comprehensive in the sense that it provided a solution for dividing every kind of pension. For two groups of pensions, the solution was benefit splitting. This method is generally familiar since it is in wide use today.[7] The second method, under which an amount is paid out from a plan also has simple, understandable outlines. The last method suggested, account splitting, is more difficult.

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4. When we talk about a transfer from a plan, we do not mean that money would be paid to the spouse. It would be transferred to another plan or vehicle to provide the spouse with retirement income.

5. At this time, we know if the member has survived and continued in employment. We also know salary and benefit levels under the plan, everything, in fact, except how long the spouse and member will live.

6. Local plans can be affected by court order (if legislation is enacted authorizing such an order) so that the court can require the plan to administer the benefit split.

7. Refer to the Working Paper for a detailed discussion of benefit splitting. The Working Paper suggested that local plans carry out a benefit split. Pensions in extraprovincial plans would be the responsibility of the member to divide.

This section sets out, *in point form*, the features of account splitting.

- The spouse is entitled to some of the status of a member of the plan (we called the spouse a "limited member.")
- A limited member is entitled to payment directly from the plan.
- A limited member is entitled to request information from the plan about the pension.
- A limited member is entitled to notice from the plan before any transaction is carried out affecting the limited member's interest in the pension.
- A limited member can decide to receive benefits at any time a member could decide to retire.
- A limited member is entitled to a proportionate share of the pension that would have been payable to the member if the member retired at the date selected by the limited member. (An adjustment is made if the limited member selects a time based on the member taking early retirement.)
- The proportionate share is basically determined by the same formula used for benefit splitting: half of a fraction of the pension determined by the duration of the marriage divided by the period over which the member acquired pension entitlement.
- The plan does not have to act until in receipt of a valid notice (from the spouse and member) or a court order.
- If the member dies before the limited member elects to receive benefits, the limited member receives a proportionate share of death or survivor benefits.
- The death of the member after the spouse elects to receive benefits has no affect on the spouse's entitlement.
- If the spouse dies first, the spouse's estate receives the share the spouse would have received.[8]

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8. If the member dies before retirement, the spouse's estate would share in the death or survivor benefits payable by the plan. If the member retires, the spouse's estate would receive the present value of the spouse's share of the pension.

These suggestions were based on one important principle: the spouse's share would be determined by the existing benefit structure under the plan. A useful phrase to describe this principle is: "you take the plan as you find it." In this way, the cost implications of pension division can be kept within the assumptions on which the plan is funded.

The foregoing is a brief overview of the Working Paper. The next Chapter canvasses the discussion that followed the publication of the Working Paper. Our correspondents made many suggestions for changing the law. We remain convinced that the general outlines of the suggested methods for pension division are correct, but many points of detail that concerned our correspondents can be addressed within that structure.

CHAPTER IV COMMENT ON THE WORKING PAPER

A. Introduction

Some grouping is helpful to deal with the many views we heard following publication of the Working Paper. At the most general level, comments fell into two groups, those in favour of splitting pensions and a definite minority against.

Those in favour can be divided into a further two groups: those who think of a pension as property and those (again, a definite minority) who view pension entitlement as a maintenance issue.

The British Columbia legislature decided in 1978 that a pension is property and is to be divided between spouses on marriage breakdown. That is the background against which this project is conducted and reflects the general consensus across Canada. It is the law even in provinces that have not enacted legislation specifically requiring pensions to be divided between spouses on marriage breakdown.[1]

Even those in favour of dividing pensions as property can be divided into another two groups: those in favour of involving the plan (usually spouses and lawyers) and those against (usually the plan).

B. Should the Plan be Involved?

It is worth repeating some of the points made in the introduction to this Report. Independently of the Commission's work, legislation has been enacted which seems to adopt the policy that plans must become involved in pension division. The PBSA apparently contemplates that on marriage breakdown a spouse will have direct access to a member's pension entitlement. This legislation may well create some of the problems anticipated by our correspondents, unless clear rules for pension division are put in place before the legislation comes into force. In our view, the appropriate focus now must not be on whether plans should be involved, but on what is expected of them when a pension must be divided.

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1. *Clarke* v. *Clarke*, [1990] 2 S.C.R. 795.

Even so, the suggestion in the Working Paper that pension division should be carried out by the plan was objected to by some for a number of reasons. It was said that involving the plan would be:

- Too costly
- Administratively impossible (or inconvenient)
- Unfair to other members
- A reason for employers to restructure plans (to frustrate the process), and
- Unnecessary

This section consider the points raised by these correspondents. The last observation is clearly the most fundamental and should be addressed first.

1. Is It Necessary To Involve The Plan?

Some suggested that benefit splitting has the potential to address all of the problems we felt could be resolved only by involving plans in account splitting. It is really a question of education. Lawyers unfamiliar with pensions are unable to use existing techniques.

There is some truth to the proposition that not all people involved in pension division are expert in it. In the long term, educational courses, perhaps through Continuing Legal Education, will help matters. But not all of the problems we identified in the Working Paper can be solved by the sophisticated use of a benefit split. These are some of the points made in the Working Paper:

1. There is a conflict of interest between spouse and member on when to retire,
2. There is a conflict of interest between spouse and member on the form the pension should take,
3. Spouse and member are often unable to cooperate on various matters that arise in benefit splitting,
4. After marriage breakdown, a benefit split gives the spouses no flexibility to deal with the parts of the pension individually,

5. Third party interests may interfere with the spouse's interest in the pension,

6. The complexity of a benefit split, and its inability to deal with particular issues, combined with the delay in implementing the split, may lead to unforeseen problems and later disputes between husband and wife, and

7. Benefit splitting can be very expensive to both spouse and member.

The following discussion develops each of these points.

(a) Conflict on When to Retire

Retirement usually means a decrease in income. A member is financially better off to retire at a later age, because retirement involves exchanging a pay cheque for a noticeably smaller monthly pension benefit. A spouse, on the other hand, gives up nothing when pension benefits commence. Moreover, usually the earlier a pension begins, the more value it represents in the long term, even if early retirement involves smaller monthly benefits. The time over which the pension is paid more than compensates for the difference in monthly amounts.

When a pension is divided by a benefit split, courts usually resolve these issues by giving the spouse an option.[2] If the member doesn't retire when the spouse wishes, the member must pay the spouse the monthly benefit that would otherwise have been available.[3]

The option solves only part of the problem. It doesn't protect a spouse where the member dies before retiring.[4]

Involving the plan in an account split, on the other hand, can give the spouse a pension when the spouse chooses and still let the member retire at a later date. Separating their interests is an effective way of resolving the conflict.

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2. *See, e.g., Re Beshara and Kennedy*, (1990) 67 D.L.R. (4th) 56 (B.C.S.C.) for a recent example. Not all courts agree: *see, e.g., Littleproud* v. *Littleproud*, (1988) 12 A.C.W.S. (3d) 217 (B.C.S.C.) where the judge left the retirement date solely to the member. *Littleproud* was disapproved of in *Beshara*, but a court could possibly make a similar order using FRA s. 51, as a method of reapportioning entitlement to the pension.

3. This approach deals with another problem. In some cases, because spouse and member are unable to cooperate, after marriage breakdown the member may be tempted to postpone retirement to delay paying benefits to the spouse. This option removes that possibility.

4. In some cases, a member could protect the spouse by arranging for insurance, or giving security against another asset. But insurance is not always available, and there may be no other asset.

(b) Conflict on Pension Options

Usually, a member can select from a number of options when retiring. A pension may be for the member's life, for example, or last for the joint lives of the member and another. The pension may be for a minimum guaranteed period. In some cases different parts of the pension can be paid pursuant to different options.[5]

The option selected affects the monthly payments under the pension. An option likely to last for a longer time (such as a joint life and last survivor pension) will pay a smaller monthly amount. A pension that will be paid for a shorter duration (such as a single life pension) will pay a larger monthly amount. In this way, whatever option is selected, the plan's obligation, on an actuarial basis, remains the same.

Women have slightly longer life expectancies than men, which might influence the selection of one option over another. Similarly, a person who remarries may wish a joint life pension to protect the new spouse. Again, the possibility of a conflict between the separate interests of the former spouse and member is obvious.

This problem is usually resolved by requiring the member to elect a joint life and last survivor pension with the first spouse. The election may not serve the different interests of the member and spouse. It is a compromise.

Involving the plan in an account split, on the other hand, can give the spouse a pension and still lets the member make a suitable election. Like the conflict on when to retire, an account split provides an effective way of resolving a conflict between the member and spouse on the form of the pension. It does so by separating their interests.

(c) Problems of Cooperation

A benefit split requires a member to divide each monthly payment and pay the spouse the appropriate amount. There have been many instances of acrimony and bad faith. A benefit split retains the financial ties between the spouses. They must remain in contact, and are often unable to deal rationally with

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5. This is the case under provincial plans, although a plan does not become involved in administering different income streams until after the death of the member.

each other. Sometimes the member forgets to make the split, or delays in doing so. Any delay in the payment of benefits will inconvenience a spouse living on a tight budget.

Comments in one submission give some idea of the problem. It is from a wife, recounting her experiences on pension division:

> I am a divorced person wishing to have [pension benefits] sent directly to me. I have gone through legal proceedings to this effect through a *Rutherford* Order and they inform me that the pension will be sent directly to my husband and it is his responsibility to send the amount directly to me....I must have a written letter on file at the Superannuation office giving me permission to any information that I am entitled to. My husband to this date has sent them no Letter, and if he chooses I would have to go back to court again if he doesn't send the Portion to which I am entitled to.
>
> As I have had to pay a lawyer once already and my maintenance had to be put through Enforcement, I would appreciate knowing if a women has to go through legal proceedings twice if the pension is not sent, and if so, could [legislation] allow for the division of the pension at source.

Benefit splitting poses other problems that only cooperation can resolve. Since the member retains the pension, the tax liability remains with the member.[6] The benefits are taxed at the member's (usually higher) marginal rate, and the spouse is usually required to indemnify the member for the portion payable on the spouse's share. Where this is the case, the spouse and member must agree annually on the amount the spouse will reimburse the member for taxes. By this point plans should not be in the picture at all. To our surprise, some plans had quite the opposite experience. Although it is not exactly clear how the plan becomes embroiled, some find themselves caught in the middle of disputes on this issue.

An account split, however, allows for separate source deductions. Not only are spouses taxed at their individual marginal rates (possibly representing a saving), but payment is assured. Separating their interests removes all points of contact and friction between the spouses.

(d) Flexibility and Changed Circumstances

After marriage breakdown, one or both spouses may remarry or assume responsibilities for supporting another. Suppose

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6. It has been suggested that dealing with the matter as a trust, and filing a trust tax return, effectively allows the separation of the tax burden, but not all lawyers we consulted were convinced that this was an effective technique.

the member remarries. The legislature has decided that a married member should take a joint life and last survivor pension.[7] That is often the best way to see to the continuing support of the member's spouse after the member's death.

An arrangement like this may be foreclosed by the terms of the benefit split. For one reason, courts usually order that the member select a pension on the joint lives of the member and the former spouse.[8]

On the other hand, account splitting allows each portion of the pension to be dealt with individually. Some of our correspondents thought account splitting posed a detriment to the member. In any event, at least with respect to the ability to deal separately with a portion of the pension, an account split clearly benefits the member just as much as it does the spouse.

(e) Third Party Interests

A benefit split is not really a division of property, since it has no impact on the plan or the pension account. Consequently, if the member should die before retiring, the spouse's entitlement is limited to the death benefits and survivor benefits (if any) paid by the plan.

Some plans provide a survivor benefit to only the current spouse of a member. If the member remarries, the terms of the plan direct the benefit to the second spouse not the first. Some courts make orders giving the spouse a share in this benefit, but it is not clear whether such an order is effective.[9] The issue has not yet been tested.

An account split, on the other hand, avoids some of these difficulties. Under the scheme proposed in the Working Paper, for example, from the date a spouse elects to receive benefits there is no longer the risk of losing pension entitlement if the member dies before retiring. The possibility of conflict with a third party is removed.

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7. PBSA, s. 35(1).
8. Under provincial public plans, a member can elect to take a portion of the pension under a joint life with the first spouse, and another portion under a joint life with a second spouse.
9. *See, e.g., Touwslager* v. *Touwslager*, (1989) 28 R.F.L. (3d) 276 (B.C.S.C.); *cf. Kelly* v. *Kelly*, (1990) 28 R.F.L. (3d) 390 (Ont. Gen. Div.).

(f) Unforeseen Problems

We were told that some settled cases of divided pensions might pose future problems. Many agreements and court orders address pension entitlement decades before the member is to retire. Some of these agreements and orders are unworkable,[10] but their flaws will not be discovered until the member retires.

One submission observed that many orders provide for the division of pension entitlement between spouses on the full amount of the monthly benefit before deductions. But the member usually receives the monthly pension benefit after all deductions have been made for income tax and the like. Sometimes, consequently, a benefit split may require the member to pay out more than is received and wait for the annual tax adjustment to recoup the shortfall.

Another problem mentioned to us is the use of terminology. Many agreements, unfortunately, use imprecise, ambiguous language that sometimes leads to problems. Selecting a retirement date is usually contentious. Some agreements determine the date of retirement by the date the member becomes entitled to a "full pension." It is a term with several possible meanings and may mean one thing to a lawyer, another to an actuary. Some people may use it to mean the date when the member can first retire without any deduction to pension entitlement. Other people might use it thinking of when a pension has maximum values, when a member has acquired maximum credits, or specific ages when the member can retire. If the arrangement between the spouse and member is described in these terms, they will have something to talk about when retirement nears.[11]

Perhaps problems like these can be attributed to a lack of legal education. But the sheer complexity of pension division issues does not make it likely that education alone will solve the problem. This is one reason why we favour relatively firm guidelines for pension division. Pension division will not call for any special expertise to invoke if fundamental issues are all worked out in advance.

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10. This point was made by a panellist at a meeting of the Family Law Subsection, Canadian Bar Association, British Columbia Branch, Vancouver Section, March 18, 1991.

11. *See* Ian Karp, "Division of Pension Rights on Marriage Breakdown: Two Important Issues," (1990) 48 Adv. 181, which canvasses the way B.C. courts have dealt with retirement age issues.

(g) The Cost to Spouses of Benefit Splitting

The current system of pension division is costly for the spouses. First, because many aspects of pension division are unsettled, there is usually some scope for dispute between a spouse and member.[12] Even if the issue does not involve court proceedings, pension division is so complicated that lawyers must often call in specialists, to value the pension and to advise on technical drafting issues.[13] We have been advised that a friendly negotiation, in which the spouses jointly engage an actuary, costs as little as $600 to $800 for an expert report (in addition to legal costs). On the other hand, we also heard of legal disputes going no further than a proceeding before a Master that entailed legal and expert costs approaching $20,000 for each of the spouses.[14] Submissions about British Columbia practice echoed a point made in *The Lawyers Weekly* about the Ontario experience:[15]

> Lawyers contacted...agreed that many of the major headaches facing lawyers and clients with respect to pensions could be cured by amendments to the [*Pension Benefits Act*] which would allow the division of pension credits between spouses on marriage breakdown...At present, the lack of certainty and protection under the Ontario Act for non-member spouses is costing clients a bundle....

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12. *E.g.*, (1) some cases divide benefits based on the monthly payments a member would receive if the member terminated employment. Most cases, however, divide benefits by identifying a fractional share to be paid the spouse when the member eventually retires. In this way, the spouse's share is based on future pension values. Which approach is correct? Cases adopting the first approach do not appear to recognize that it is out of step with what most courts are doing. (2) If the pension division is to be carried out by a benefit split, all the court needs to do is identify the appropriate fractional interest to be assigned the spouse. Sometimes, however, courts ignore that issue entirely and instead identify a lump sum value for the pension. Not only is that an expensive way to proceed (since experts must be retained to value the pension) no guidance is given on how the share of the lump sum value is to be translated into a benefit split. (3) Sometimes the courts simply say that the pension shall be divided by a benefit split in terms of the typical "*Rutherford* order" unaware that *Rutherford*, decided in 1981, does not deal with all pension issues and in the past decade many matters of detail have been addressed – and settled – by other courts. (4) Sometimes courts divide contributions made to a pension, oblivious to the fact that this approach was rejected in the first two years of pension division under the new legislation and usually represents only a fraction of the value of the pension. (5) Some courts are confused by the distinction between valuing a pension and identifying the portion of the pension that is a family asset and divisible between the spouses. (6) Some courts accept Court of Appeal *dicta* for determining the portion of the pension that is a family asset as binding precedent preventing them from dividing increases in value associated with that portion. All of these issues are discussed in more detail in Appendix B.

13. While valuation is not usually a necessary part of a benefit split, in some cases it appears that lawyers and courts feel it necessary to have that information. Possibly, the reason is to be equipped to assess accurately other options for pension division, such as the making of a compensation payment. *See further* Appendix B.

14. Costs can also escalate where the plan becomes involved and resists the legislated method of pension division: *see Low* v. *Edgar*, (1990) 28 R.F.L. (3d) 318 (S.C.) where the legal costs of the spouse and member were ordered to be paid by the plan.

15. C. Schmitz, "Pension Agreements New Source For Lawyer Liability?" *The Lawyers Weekly*, Nov. 18, 1988.

(h) Summary

An account split resolves a number of problems that cannot be dealt with by benefit splitting. For example, it deals with the conflict on when to retire and on the form of the pension. It also takes into account the likelihood that spouse and member will have separate lives with incompatible needs. A benefit split requires a degree of cooperation, that cannot always be achieved between divorced spouses. If the member refuses to cooperate, then the spouse whose (often few) resources have been depleted in legal proceedings for a share of the pension must commence enforcement proceedings. Many technical issues, like tax obligations, cannot be dealt with easily. Even where technical issues can be addressed, it is often at a surprisingly high cost.[16]

In short, benefit splitting is often an ineffective method of pension division. Account splitting, on the other hand, deals with the problems discussed above.

As mentioned earlier, however, we received submissions objecting to account splitting on other grounds which, basically can be grouped under two further heads: we were told that account splitting is

- bad policy, and
- impracticable.

2. Is Account Splitting Good Policy?

The policy arguments raised in opposition to adopting account splitting focused on the fairness of the process. Some felt that account splitting would be unfair because it had the potential to affect the rights of other members in the plan as well as upset existing arrangements (including those structured in a trust relationship.)

In part, these arguments are based on predictions that account splitting will have a far reaching impact. Correspondents holding these views also believe that the costs of account splitting will be excessive and directly affect the plan and all of its

16. Various methods can be applied to make a benefit split work more smoothly, even if not all of its problems can be solved. *E.g.*, using modern banking techniques, it is possible to set up a bank account to receive pension payments, and attend to the division by automatic withdrawals to accounts in favour of the spouse and member. Even so, these methods do not seem to be widely used.

members. The costs issue is addressed in the next section. With respect to the possibility that account splitting will affect other members, it is worth emphasizing that the suggested method is aimed only at dividing pension entitlement earned by a specific member. Properly structured, there should be no impact on other members.

Some correspondents seemed to believe that there is something wrong in intervening in anything modelled on trust principles. The law, however, has to deal with many different forms of ownership and financial structures when deciding to what degree the legitimate claims of one person can be advanced against property owned by another. Trust relationships are set up for many commercial purposes. Pensions is one example. Registered retirement savings plans and syndicated mortgages are others. A person may have legal title to property, or only a beneficial interest in it. Even so, the general rule is that creditors can satisfy their claims from their debtor's property whether the interest owned is legal or equitable (although usually creditors must get a judgment to do so).[17]

Pensions have traditionally been protected from the claims of creditors. This is because the social policy in favour of protecting retirement income is a strong one, not because trust property is sacrosanct. But the fair division of family property advances equally strong social policies. Independently of our work, consequently, the government has expressly adopted the policy that pension entitlement should be available to the non-pensioned spouse. Recent legislation[18] expressly makes pension entitlement subject to family property claims.

The points raised against account splitting are not compelling. Account splitting is a necessary part of advancing the social policy in favour of a fair division of family property between the spouses on marriage breakdown. Even so, we agree with the points raised by these correspondents to this extent: plans and their members should not be subsidizing the process of dividing family property. We also agree that it is a necessary feature of new law that it ensure that the spouse's interest is confined to a share of the member's entitlement.

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17. *See, e.g., Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 56.
18. PBSA, ss. 63 and 64.

3. Is Account Splitting Practicable?

(a) Calculating the Spouse's Share

Even if account splitting is an improvement on existing methods of division, some said that it would be so difficult as to be effectively impossible and, if possible, too costly. For example, one correspondent said:

> Because of the nature of pension entitlements, a split of a member's rights cannot be done on an actuarial equivalent basis for one individual. Even if it were possible to do so, it would be incorrect shortly after it is done. The effects of mortality, investment return, general inflation, salary changes, expenses, taxes and retirement age choices combined with pension plan rules may be predicted for a group. However, the effects on the value of an individual's entitlement cannot be precisely calculated.

These comments strike at the heart of actuarial science. It is impossible to predict with complete accuracy what the future holds for an *individual*. Nevertheless, legal rights in a whole spectrum of areas (such as determining insurance premiums, or assessing personal injury) involve, from time to time, arriving at values reflecting future events based on various assumptions. These calculations are based on average experiences over a broader base. This is no less true for the division of a pension. For example, compensation payments between spouses to divide pensions are currently valued taking into account factors like those listed by our correspondent.

In the Working Paper, we identified a standard by which spousal entitlement could be measured. That standard was the likely amount that would be paid to the member who retired at a specific date. Actuarial calculations can arrive at a statistically likely result. Since plan funding is based on the entitlement of its members, this approach brings the calculations within secure parameters. Plans are protected overall, even though individual cases will not exactly conform to the specific assumptions on which the calculations are made.

Moreover, the suggested model for account splitting is surprisingly straightforward. Where, for example, the division takes place when the member retires, the plan obviously knows the monthly amounts that will be paid to the member. Where it takes place before the member retires, it is calculated on the amount that would have been paid to the member had the mem-

ber retired on the date selected for division. The plan can also determine the monthly amounts payable in that case (although the Working Paper noted that the need to adjust benefits because they are paid on an early retirement basis did introduce a complicating factor).

Calculating the spouse's share of the monthly amount is not a difficult arithmetic exercise. It requires multiplying the amount paid the member by the fractional interest credited to the spouse. It is an approach so simple that we currently leave it to the member to carry out under a benefit split. The amount paid to the spouse is to be adjusted to reflect differences in mortality rates that apply to the spouse and the member. But this is an exercise plans are familiar with as well, because these kinds of adjustments are made all the time when determining joint life and last survivor pension benefits. The most onerous task the plan will have, while the spouse and member are alive, is printing the monthly cheque and providing the usual information available to members.

We do not wish to pretend that pension splitting is not technical, and the summary above possibly paints too blithe a portrait of what is involved. But many complex matters can be dealt with by putting appropriate systems in place. Computers can handle surprisingly sophisticated matters, and those operating the computers are only required to input very simple information. The only variables needed for pension splitting (whether at or before the member's retirement) are the age of the member, the age of the spouse, the duration of their marriage, and the period during which the member has earned pension entitlement.[19] The plan knows some of this information already but, even so, all of it will be set out in a notice or a court order, delivered to the plan.

Account splitting is possible. That leaves the issue: is it too costly?

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19. Valuation issues are usually dealt with by plans in advance, and many operate with standard tables to make adjustments between various options. Similar tables can be developed for adjusting for differences in the age of the spouse and member to make sure that the portion paid the spouse falls within the range of payment that probably would have been paid to the member. This is a simple statement of technical matters. The tables used reflect many assumptions, and must be developed by actuaries expert in the field. But once in place, they can be used by plan administrators to make the necessary calculations. We speak of tables for simplicity's sake but in most cases a computer program will probably be used for these purposes.

(b) Administrative Costs of Account Splitting

Any change that places additional burdens on a plan will increase its costs. The question is the degree to which costs will increase. No one really knows. People involved in pension administration have given us their best guesses.

Some, opposed to the scheme, have suggested that each case of pension division will increase costs by amounts measured in thousands of dollars. Others have said that once the appropriate systems are put in place, the costs will be nominal (a few hundred dollars at most). The best evidence is that of plans who are involved in pension division. We were informed by two private (that is non-governmental plans) who have voluntarily allowed pension splitting, that the administrative costs are nominal. One said that pension splitting is basically "a blip on the computer."

Those who predict greater costs may be misled by current experience. When plans become involved in pension splitting today, it is often in the midst of a hostile legal dispute. Each side will request information about the plan, perhaps on several occasions, as the process of negotiation and litigation proceeds. Uncertainties under the current law and the difficulties anyone has in mastering the concepts lead to confusion and wasted efforts, all of which can be costly. Since all of this is carried out in an adversarial environment, it is inefficient, time consuming and expensive.

Plans may become directly involved in one of two ways. First, they may receive directions (in an agreement or court order) that cannot be acted upon. Merely explaining to the parties that their arrangements are ineffective may result in significant costs, if only in employee time. Second, plans may be served with a binding order (under federal legislation for example)[20] which appears to conflict with the terms of the plan. For safety's sake, further legal direction may be necessary and the plan will require legal representation and expert advice. All of this may be expensive, particularly if, in the view of the court, the proceedings should not have been brought at all.[21]

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20. *See, e.g., Low* v. *Edgar, supra*, n. 14.
21. *Low* v. *Edgar, ibid.*, where the plan was responsible for the parties' costs, usually an expression of judicial disapproval.

These are problems, however, that we believe a legislative scheme, which includes account splitting, will largely solve. There may well be initial uncertainty leading to some expense while matters are worked out. It is regrettable that the scheme that we recommend in this Report could not have been put together with the more willing assistance of plans and their advisors. Even so, the process should eventually operate as efficiently, automatically and cost-effectively as pension division under the Canada Pension Plan, where contentious issues leading to litigation have not arisen at all.[22]

To summarize: many of the costs predicted by some correspondents currently exist. Some of these will be minimized, and others entirely resolved, by revising legislation. What is expensive to do today on an ad hoc basis can be computerized and performed for many without undue cost, provided the guidelines are certain enough.[23]

Nevertheless, the scheme set out in the Working Paper can be simplified in some respects, without minimizing the general benefits of account splitting. In this way the impact on plans can be somewhat reduced. A more streamlined method, at least initially, will give everyone time to come to terms with the new regime of pension division. Once account splitting is familiar further options might possibly be added. Since some plans have voluntarily provided pension splitting, it may not be too much to hope that once the new legislation is in place, plans might provide additional refinements on a voluntary basis.[24]

(c) Simplifying the Account Split

In the Working Paper, it was suggested the spouse should be able to deal with the pension share in the same way as a member. That would mean being able to decide when to "retire" (by reference to dates when the member could retire) and the form of the pension (from the same options available to the member,

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22. The only litigation inspired by the Canada Pension Plan division scheme relates to when a spouse is allowed to waive entitlement to a share of the member's pension.
23. We will consider below the desirability of judicial discretion in pension division. The cost and inconvenience to plans and spouses is one reason why we have decided to place some restrictions on judicial discretion.
24. For one reason, so long as a spouse will have some of the rights of a member, it probably is more efficient to treat them as members, rather than as a sub-category of benefit recipients. In this way, existing systems can be used for day-to-day administration after pension splitting, instead of setting up an entirely separate process.

such as a joint life and last survivor pension or a pension for a guaranteed period).

A plan prepared to deal with a spouse in the same way as a member would find few administrative cost implications in these features of pension division.[25] Moreover, the overall cost would remain constant, on an actuarial basis, since the monthly amount of the pension would be adjusted to reflect when payments begin and their likely duration.

Even so, these features are not necessary for achieving an effective and fair method of pension division. The policy of protecting a spouse on marriage breakdown is met if the spouse simply receives benefits in the form of a single life pension.

The Working Paper suggestion that a spouse be allowed to receive benefits before the member retired, and other aspects of pension division, can also be simplified to protect the plan, without weakening the protection the law affords the spouse.[26] We will return to these matters later in this Chapter, when we consider methods of carrying out an account split.

(d) Rights to Information

Any system of pension division must make sure a spouse has access to information about the plan and the pension. The impact on a plan, in terms of administrative burdens and costs, depends on how the information is made available. One idea explored in the Working Paper was to provide that while a spouse was entitled to information about the plan and the member's pension, this information was available only once a year, upon request.[27]

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25. It is important to note that this is an issue where comment was mixed and many argued that the administrative difficulties would be immense. This statement, consequently, reflects our conclusion based on the evidence before us.

26. There is another reason for simplifying the process. Some correspondents felt that the techniques we suggested were too difficult to understand and apply. With respect to commencing benefits at a date before the member retires, *e.g.*, refinements were introduced to protect plans from paying out too much. A pension payable on early retirement is often supplemented by the plan or the employer. There is a trade off because the employer no longer has to pay the employee a salary that is usually higher than benefits under a pension. But paying a spouse benefits calculated on this basis would be unfair since there is no advantage to the employer. An adjustment must be made. Understandably, the necessary adjustments are technical and not obvious to people without the necessary mathematical training. Modifications to make the model simpler and more comprehensible to non-experts are discussed later in this Chapter.

27. A spouse would be protected from unexpected changes in the pension by giving the plan notice of the interest claimed. The notice would prevent the plan from acting until after the spouse has 30 days warning. This would allow a spouse time to take necessary steps – including, *e.g.*, applying for injunctive relief from a court.

Some of our correspondents felt that the obligation should be on the plan to advise the spouse of any information it provided its members:

> We do not agree with the option of placing the onus on the spouse or limited member to ask for information. A spouse should be sent an annual statement just like a regular plan member. Limited membership would mean that all information normally disclosed to the member would also be disclosed to the spouse. The only obligation on the spouse should be to provide the plan administrator with an up-to-date address. When the member makes an application to receive a benefit, the spouse should be notified and provided with all information.

The last point made by our correspondents was in fact part of the suggested legislation set out in the Working Paper. On the first point (whether a plan should be obliged to keep a spouse informed) we understand our correspondent's views. We also recognize that plans have legitimate concerns over apprehended difficulties. Requiring a spouse to inquire is not too much of an inconvenience. And adopting this position will give plans a chance to find out what the real administrative difficulties are. Possibly a review in several years time will suggest that many innovations are possible. But at this point, it is convenient for all parties to start off with a relatively simple model for pension division.

(e) Partial Indemnity

The Working Paper suggested that plans should bear the cost of pension division. This is the view that has predominated in the United States, which has some experience with pension division. Most of our correspondents felt that the nominal costs of pension division should be borne by spouse and member. For example, one group wrote:

> Administrative costs should be borne by the affected parties (the spouses). In accordance with trust law principles the rights of the other plan beneficiaries should not be adversely affected by having to bear these costs. Further, as the Commission states, these administrative costs will not likely be excessive once systems are in place.

Another group wrote:

> In many negotiated pension plans the level of contribution is set by outside parties in collective agreements etc. and the Trustees have no power to require additional contributions to make up for expenses or other costs related to allocating pension rights and

> setting up accounts and maintaining records for limited members or for cost fluctuations resulting from the allocation process.

We are prepared to accept the consensus on the issue that the spouse and member should be responsible for paying a prescribed amount to offset costs incurred by a plan in pension division.

It was also suggested to us that the costs would not be nominal and that the spouses should be responsible for fully indemnifying plans for pension division:

> Two new methods...recommended...will involve pension plan administrators much more directly in pension division than has been the case in the past. In our opinion, many plan administrators will find this new responsibility much more daunting than is anticipated by the Paper. Large pension plans with experienced and knowledgable administrators should be able to implement the proposed new methods of division with minimal external assistance. However, for the substantial majority of plans this will be an infrequent occurrence with many administrators, fearing the consequences of a mistake, will refer to their professional advisors, usually actuaries.

We recognize the concerns voiced in this submission, but cannot see how a full indemnity scheme could operate. Some plans might, accidentally or for other motives, generate quite onerous costs, perhaps with a view to discouraging pension division. Moreover, it is a general principle that people are required to obey the law. If, out of caution, one party must consult experts, it is not clear that another party insisting on its rights should have to bear any responsibility for the costs.[28]

Even so, the costs of pension splitting should not be inordinate. The last submission quoted suggested that there would be expenses, possibly requiring actuarial assistance. But the calculations should not be any more onerous than those called for under current methods of pension division. In that respect, it was mentioned earlier, we have been advised by a number of people that the usual costs are currently between $600 and $800 where the expert advice must deal with a series of issues simply because so much of the law is unsettled. Even if it is necessary to bear costs like these on an ad hoc basis, they are not extreme. A prescribed amount payable by the spouses should provide at least some indemnity. Moreover, as mentioned before, once systems

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28. *E.g.*, where a judgment creditor seeks to recover on a judgment, the debtor will be responsible for the costs of the execution, but not for the costs of various legal opinions as to the legality of the steps the creditor is taking. A system of rights and responsibilities does place some costs on those operating within it.

are put in place, the costs do become nominal or, to repeat a memorable phrase, "a blip on the computer."

It has been suggested to us that a realistic amount to be paid by the spouses is as follows:

- for a pension in a defined benefit plan: $400
- for a pension in a defined contribution plan: $100
- for a hybrid plan: $500.

These amounts should be set out in regulations to the legislation and monitored by a suitable body. One possibility is to tie the administration of pension division legislation in with the PBSA and allow the whole supervisory structure under that legislation to apply.[29] We have not included this option in the draft legislation set out in Chapter V. Including it should be considered when the PBSA is in force.

4. Conclusions

In the light of points raised in submissions on the Working Paper, we have reviewed the policy of involving plans in pension division. Our conclusions can be summarized as follows:

1. Plan involvement is a necessary feature of pension division.

2. Pension division legislation should ensure that the value payable to the spouse and member under a divided pension does not exceed the value that would have been payable to the member if the pension had remained intact.

3. Pension division legislation should require the spouse and member to pay a prescribed amount to offset the costs plans will incur in administering a divided pension.

4. Pension division legislation should provide a streamlined, unadorned pension division model, to minimize the administrative demands on plans while continuing to protect the interests of the spouse and member.

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29. A superintendent is designated under the Act and acts with the advice of a Pension Benefits Standards Advisory Council.

C. Models for Pension Division

1. Generally

Most of the comment on the Working Paper agreed that legislation must allow pension division at source, either by a benefit split or an account split. Unanimity fell apart on which of these two general approaches to apply.

There was no debate concerning the appropriate method for dividing pensions in defined contribution plans. Their division is straightforward because they operate like a deposit account. The concern was with the division of pensions in defined benefit plans.

The Working Paper suggested that a "deferred account split" be used for pensions in defined benefit plans.[30] For the purposes of our discussion, a brief reminder of its features is useful.

Upon notification, the plan sets up a separate account for the spouse of the spouse's share of the member's pension. The spouse is treated in many respects like other members. The term "limited member" describes the spouse's status under this approach. The deferred account split lets the spouse elect to receive pension benefits directly from the plan and decisions about the spouse's share can be made independently of those dealing with the member's share.

The suggestion found broad support, particularly among lawyers, actuaries, judges and women's groups. One group wrote:

> Law reform in the area of pension division upon marriage breakdown has tremendous implications for the control women will have over their financial security. Economic protection for divorcing women remains inadequate as it is often the husband, the pension holder, who retains the decision-making power. [We are] particularly concerned that spouses who do not receive pensions in their own right are tied for their lives to the health and employment decisions of their spouses. The adoption of the concept of a limited member designation and of the deferred account split will address these issues.

But this was only one among many views emerging from comment on the Working Paper. A surprising number favoured the current methods of pension division and saw no need for a

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30. This would apply to local plans where the member had not retired at the time of pension division.

change. Among those who like an account split, views ranged widely over how it should be carried out. This section provides a brief overview of the various models for account splitting suggested to us and the views of our correspondents on them.

2. Account Splitting Models

(a) Actuarial Equivalent Model

The Working Paper proposal has a unique feature. It does not involve valuing the pension. Instead, the spouse receives a proportional share of whatever benefits would have been paid to the member.[31] A number of correspondents preferred a system under which the spouse's share is formally valued, using accepted actuarial methods. Some would have adopted a combined approach, under which the deferred account split would be used to divide the pension when the member retired, but other options would be resolved by the actuarial equivalent model.

Some favoured the actuarial model because it is familiar, although it is open to the objections we set out at length in the Working Paper (the most serious of these is that many fundamental questions relating to assumptions that must be made for valuation are controversial). Some who favoured the actuarial model suggested that the Canadian Institute of Actuaries could be asked to develop ground rules for pension division.

Some correspondents agree that the actuarial model is not currently working well simply because so many valuation issues are unsettled and therefore fair game for litigation. Reviewers falling into this group suggested refinements and variations based on other existing methods of pension division.

(b) Benefit Split Analogue

One of these ideas was a modified benefit split. Under it, a member must take a joint life pension and the plan must pay the proportional share to the spouse. It answers many of the problems of pension division.

The modified benefit split even accommodates a member who remarries. One part of the pension stream is paid for the

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31. The benefits are adjusted to reflect, among other things, differences in age.

joint lives of the member and spouse1, the other for the joint lives of the member and spouse2.

One group suggested that this was the only method of splitting benefits at source that plans would accept.[32] The process was described as follows:

> We recommend the following mechanism when it is appropriate to split a mature pension: on retirement, the prorating factor is applied to the pension to determine the amount of pension to be divided equally between the two spouses. This amount of pension is then converted to a joint and 50% survivor pension, reducing on the first death of the member and spouse. The amount of pension to be divided is then split into two equal parts, and each part is paid on a life only basis to the member and the spouse. On the first death of either the member or the spouse, the 50% survivor benefit continues to the survivor. This approach does result in different values to the member and spouse, but it is simpler by far than any other alternative.

Benefit splits, however, do not deal with all of the problems we outlined earlier. Those who favoured this technique did so largely because it is familiar. They did not explain why, if it was possible to carry out the pension split in this way, it was not possible to completely separate the interests of the spouse and member. The chief difference between the benefit split described here and the suggestion made in the Working Paper is that under a benefit split, the spouse's share is paid under a joint life option, while under an account split it is paid on the spouse's separate life. All that is necessary is a relatively straightforward actuarial adjustment to the payment stream.

(c) Three Termination Models

People and groups also wrote who favoured a form of account splitting applied elsewhere in Canada and the United States, which is known as the "termination model." This method values the pension assuming the member terminates employment as of the valuation date. Some correspondents favoured a simple model, but two variations were also suggested.

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32. The province already allows this technique for public plans. Public plans will calculate benefits on different portions of the pension, based on different selected options. *E.g.*, one part can be for the joint lives of member and former spouse, another for the joint lives of member and current spouse, and another on the member's single life. The plan, however, pays only one monthly amount to the member (who must then make separate payments as required). If the member dies first, however, at that point the plan will pay the surviving spouse(s) directly.

(i) Termination Model: The Basic Method

Most of those who favoured the basic termination method lived in jurisdictions where this is the only available method of pension division.

It has the advantage of simplicity, but it arrives at a value that is not necessarily a fair assessment of the spouse's interest. Unless an appropriate adjustment is made, the amount received, even if properly invested, will not generate the same kind of funds as that portion would have if left in the member's hands. A few years of inflation effectively wipes out the benefit of the pension split. Mr. J. B. Patterson (a Toronto based actuary) describes the process as follows:[33]

> In most instances, the plan sponsor becomes the big winner if a client chooses to accept the transfer value...
>
> For example, the plan may be holding assets of $100,000 to cover its liability for your client's rights in the pension. Such a large amount is necessary to provide for future inflation indexing and other features such as "unreduced early retirement"...
>
> But, if the plan's sponsor can persuade your client to accept a transfer value, the plan can avoid 20 years of indexing for inflation. The transfer value in the example above may only be $20,000 to $30,000, or even less if the plan has an unreduced early retirement feature. This means that a minimum of $70,000 would be made available to pay sponsor contributions for other members. (There are a few exceptional plans which take into account full pre-retirement indexing for inflation in calculating transfer values, but these are rare).

Practices vary from jurisdiction to jurisdiction and from plan to plan. We are advised that most plans that adopt a termination method do not profit from it.[34] It is a value neutral exercise from the plan's perspective. The spouse's share is simply deducted from the member's share. But to the extent that the calculations proceed as suggested in the quotation, then the member seems to benefit from the process at the expense of the spouse.[35]

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33. *See* "Money and Family Law," vol. 6, No. 3, March 1991. The extract refers to the process of valuing the member's pension if the member wishes the value transferred from the plan. The same principles, however, apply when valuing the spouse's interest under the termination method. *See also* Patterson, *Pension Division and Valuation* (1990).

34. The practice under the Manitoba legislation, however, seems to produce a lesser value when benefits are split. This would seem to be the only reason why plans are so insistent on requiring pension division, even where both spouse and member object.

35. Essentially, the share of pension entitlement accrued during the marriage is worth more in the hands of the member than it is in the hands of the spouse.

One correspondent in particular firmly defended the policy:

> ...the point that seems to be made by Mr. Patterson and which women's groups, for example, do support, is the following. Given that in a defined benefit final earnings pension plan, the pension continues to increase on account of future and contingent events such as future salary increases, early retirement where certain subsidized additional benefits may be payable and the like, it is desirable from the point of view of the spouse to claim a share of those benefits as well. Mr. Patterson illustrates the case by stating that the amount to be shared, including those contingent and future benefits, could be $100,000, whereas it would shrink to $20-30,000 were those contingent benefits excluded. This sort of situation is possible. In fact, one could stretch the argument to include plan improvements that may be granted after the divorce, which may be beneficial to the member and in which the spouse may want to share as well. However, while all these statements may be true, it is our understanding that regulators have found them to be irrelevant for the following reasons.
>
> A member who divorces can share only assets which he/she owns or has an unconditional right to. There is not much point in dividing conditional or contingent assets which the member may not have the day after the divorce takes place. For example, an employee may have the expectation of receiving a benefit worth $100,000 one day, and be terminated the next day and see his pension benefit shrink to $20-30,000. If 50% of the $100,000 amount had been distributed to the spouse on the assumption that benefits should be split 50-50, not only would this mean that the employee would not receive the anticipated 50% share, but that the employee would actually owe money to the pension fund; that is, the difference between the $20-30,000 benefit payable had divorce not occurred and the $50,000 already distributed to the divorcing spouse. This example should illustrate the pitfalls inherent in distributing contingent pension benefits that are not at all in the unconditional and unrestricted possession of the plan member.

This submission makes two points. The first is to question the policy of dividing increases in a pension account that occur after marriage breakdown between spouse and member. We addressed the pros and cons of this issue fully in the Working Paper.[36] We remain convinced that the correct policy is to protect the value of the divided pension.

The second point is that pension division schemes that attempt to divide pension benefits before retirement are flawed. We agree. It was not an element of the scheme we suggested.

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36. *See particularly* Appendix C to the Working Paper.

(ii) Termination Model: The Retained Fund Method

Another alternative aimed at dividing the pension account immediately (while solving the problem of dividing contingent benefits, referred to by the correspondent in the last section). It was suggested, basically, that a plan that did not index benefits should segregate the spouse's share, valued on a termination method, and then add to its value each year the member retains membership in the plan. Each year the spouse's share would be credited with interest and the ratio by which the Consumer Price Index has increased in the year. (This offsets the fact that the original transfer value was calculated assuming no pre-retirement indexing even though the member was still employed.)[37]

In this way, the spouse would have an immediate property right and would no longer have to deal with the member. Moreover, the value of the interest would be protected.

The advantages of this approach were summarized as follows:

(a) The spouses are no longer tied together economically after the marriage breakdown;

(b) There is no significant loss of security on the member's premature death. An appropriate fund already stands to the credit of the spouse;

(c) The spouse can retire at anytime, even before the member qualifies for any retirement benefit and can elect any option. Funds can be transferred to a life-insurance company or arrangements can be made to have the plan administrator pay the benefits so that the spouse can share in any ad hoc post-retirement indexing that was not allowed for in calculating the original transfer value;

(d) The spouse is not sharing in the advantage of any promotions and other achievements of the member after the date of marriage breakdown;

(e) There is no need for any evidence of the member's health as the spouse's interests are completely separated from the member's interest immediately after the date of marriage breakdown;

(f) No new complicated mathematical concepts are added. The method utilizes only the calculations of the member transfer value already provided for in Section 33 of the PBSA....

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37. The retained fund method is described in greater detail in Patterson, *Pension Division and Valuation* (1990).

The retained fund method has many attractive features and solves the chief problem with the termination method. The cost of living adjustment, however, by its very nature departs from the rules of the plan relating to the calculation of benefits. A guideline we have adhered to is that pension division should, as closely as possible, take each plan as it finds it and not alter its benefit structure.

There is, moreover, a simpler method – discussed in the next part – of solving some of these problems. The trade-off for simplicity is that some of the elegant features of the retained fund method are lost. One of the most intractable problems we have encountered in this project is striking the right balance among precision in pension division legislation, its attendant complexity, and the need for comprehensibility. It is an issue we return to later in this Report.

(iii) Termination Model: The Deferred Termination Method

The last termination model builds upon the approach that applies when a member terminates employment and requests the transfer of pension entitlement to another pension vehicle. The PBSA will set out how this is to be calculated.

The PBSA refers to the transfer amount as the "commuted value" of the pension. It is useful to keep this term in mind. The commuted value is based on the same philosophy as the basic termination method, but specific assumptions are set out in the Act. It is, consequently, a useful standard to apply, provided the difficulty of arriving at a fair value for the spouse's share can be resolved.[38]

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38. Commuted value calculations are necessarily based on the basic termination method because the member leaves the plan on the valuation date. Increases in the amount of the pension following the payment out are not taken into account. The approach is a sensible one if, in fact, the member is leaving employment. Where the member remains in the plan, however, usually pension entitlement earned during the marriage becomes more valuable. Under a termination model, consequently, the pension entitlement related to the marriage is worth more in the hands of the member than in the hands of the spouse. This kind of approach is objectionable in principle. Compare, *e.g.*, a benefit split, under which the division results in both the spouse's share of pension entitlement associated with the marriage has an equal value to that enjoyed by the member. (The member may receive a larger amount for portions of pension entitlement that are not being divided such as (i) the portion earned before marriage, (ii) the portion earned after marriage breakdown, and (iii) any reapportionment the court may have made of pension entitlement earned during the marriage.) *See also, supra*, Subsection (i) "Termination Model: The Basic Method."

Modifying the termination method to defer its operation until a later date would seem to provide most of the answers. Under a deferred termination method, the spouse could wait to request pension benefits. The plan would transfer to the credit of the spouse a proportionate share of the commuted value of the member's pension, calculated as though the member had terminated membership on the date selected by the spouse for the transfer. The plan would transfer the spouse's share to another plan or RRSP so that the spouse would eventually receive the share in the form of a pension. The closer to the member's actual retirement that the calculation is made, the less opportunity there is for inflation to diminish the value of the spouse's share.[39]

This approach does not prejudice plans, since there is no guesswork involved in the calculation (it may, in fact, represent a gain, since the spouse will still suffer some loss under this approach, unless the amount deducted from the spouse's share is passed on to the member). It is based on the same principles that apply to valuing the pension had the member left employment. Even more, the termination approach is one that many people feel comfortable with simply on a conceptual basis.

(d) Conclusion

Points made by commentators on the Working Paper underscore that to operate satisfactorily, there are several key features that must be part of pension division legislation. The legislation must not only be fair and provide appropriate solutions for different kinds of plans, it must strive for simplicity. Moreover, it must not be expensive to operate and any impact it has on plans or other members must be kept to a minimum.

We remain convinced that the deferred account split suggested in the Working Paper is the best model for pension division when the spouse is to receive pension entitlement at the same time the member retires. The majority of our correspondents agreed on this point. The suggested model, however, was controversial with respect to its operation before the member retired. Some found it difficult to understand conceptually the op-

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39. The theoretical structure of this model is that the spouse has a continuing property interest in the member's pension. Consequently, there is no reason why the spouse cannot wait to have the share paid out. Since the value of pension entitlement for particular years often changes over time – either the benefit formula is adjusted or it is determined by the member's salary which typically increases – the spouse would be wise to wait for the pension to come close to its maximum value before requesting transfer of the share.

eration of the model in this situation and others were critical of the results it would achieve. For these reasons, we think that the pension division methods we suggested must be further refined.

The suggested alternatives canvassed above would probably each work reasonably well, but the methods we think best meet the objectives listed at the beginning of this section are the three termination models. The basic termination model is widely used in other provinces and countries and well understood. The refinement of deferring the payment out to a later date is not a particularly difficult idea and one that offers a number of advantages.

The deferred termination model can be made to serve in situations where, in the Working Paper, a more complex solution was suggested based on equating the spouse's rights with those of a full member. It is a substitute, for example, for the idea of allowing a limited member to elect "early retirement" and receive benefits from the plan.

It is our conclusion that a spouse who wishes to wait until the member retires should be entitled to a pension based on the deferred account split described above. But a spouse who wishes to retire at an earlier date will have entitlement determined according to the deferred termination method.

Should the legislation allow a spouse to elect to receive pension entitlement calculated on a termination method at any time before the member retires, or be restricted to times when the member may choose to retire? In some cases, a spouse who simply wants to finalize matters will be prepared to accept a slightly smaller payment in satisfaction of pension entitlement. Provided the spouse understands the position, and appreciates the advantages of waiting for pension entitlement to be transferred to another plan, there can be little objection to leaving the issue to the spouse to decide. On the other hand, few people, including legal advisors, seem to have a firm understanding of pensions and how their values change over time. It is possible that such a decision would be made without enough information or proper advice.

These factors suggest that it would be useful to not let a spouse elect a transfer of entitlement under a deferred termination method until the member first becomes entitled to retire. This approach protects a spouse from electing to have the trans-

fer made too soon, when the assumptions used for valuation will arrive at an inadequate amount.[40]

To summarize, in the discussion above we have reached the following additional conclusions:

5. As a usual rule, a pension in a local unmatured defined benefit plan should be divided by a deferred account split when the member retires.

6. A spouse who wishes to have a pension in a local defined benefit plan begin before the member decides to retire, should be able to elect to have a proportionate share of the commuted value of the pension transferred from the plan to the credit of the spouse.

7. The commuted value under Principle 6 should be determined as of the date selected by the spouse for the transfer, as though the member had left employment on that date and requested a transfer of the pension entitlement under the Pension Benefits Standards Act.

8. The transfer under Principle 6 should be governed by the same rules which govern the transfer of commuted value of a pension from a plan to the credit of a member, under the Pension Benefits Standards Act.

9. The transfer under Principle 6 should not be available any earlier than the date the member first becomes entitled to elect to retire and receive pension benefits.

D. A Uniform Approach For Dividing All Family Assets

1. GENERALLY

The Working Paper suggestions were aimed at devising a scheme that did not depend upon judicial discretion for its operation. Family property legislation in British Columbia, however, depends upon the exercise of a generous discretion. The objective features of pension division, and the apparent departures from

40. Delaying the transfer does not prejudice a spouse who, in any event, must have the monies paid out into a qualifying financial vehicle, according to the terms of the PBSA, to provide benefits in the form of a pension so that the essential character of the asset (to provide retirement income) remains unchanged. The only danger in delay arises if the member dies prematurely. But that concern can be addressed by ensuring that the spouse has adequate rights to share in death or survivor benefits payable on the member's death.

general principles of family property division, concerned some correspondents.

2. Flexibility

The one unchanging issue in all of our work on family property is the clash of views on judicial discretion versus firm guidelines for property division. Many lawyers favour judicial flexibility because it allows them to more carefully tailor the division of family property on marriage breakdown. Many, however, were prepared to forego some flexibility if it meant that in most cases the issue of pension division would be removed from the bargaining table entirely. Comment from the public that we received on the Working Paper on pension division and on our earlier work on family property issues[41] also favoured more certain rules for property division in order to avoid protracted disputes and litigation.

Appendix B discusses recent cases dealing with pension division. It is clear that the level of comfort with these issues is not high. We continue to believe that a method of pension division that does not in every case require expert assistance will benefit the people of British Columbia generally. Lawyers may speak highly of the advantages of judicial discretion, but many ordinary people involved in family property disputes when their marriage breaks down think less well of the whole process.

Even so, the scheme set out in the Working Paper retained a role for judicial discretion. The primary difference between the Working Paper and the current law is when the discretion is to be applied. The Working Paper suggestion was that the discretion apply only in exceptional circumstances. The current law, on the other hand, depends almost entirely on a discretion to complete most pension divisions.

The draft legislation in the Working Paper may not have been clear enough on the role judicial discretion should play in pension division. A useful addition to the legislation would be a section clarifying that the court retains discretion to adjust the division of a pension under section 51 of the *Family Relations Act*

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41. *See Report on Spousal Agreements* (LRC 87, 1986); Anderson & Karton, *Study Paper on Family Property* (1985); *Working Paper on Property Rights on Marriage Breakdown* (W.P.63, 1989); and *Report on Property Rights on Marriage Breakdown* (LRC 111, 1990).

(if division cannot reasonably be adjusted by reapportioning entitlement to other assets).

3. Pension Entitlement Acquired Before Marriage

One of the difficult questions addressed in the Working Paper regarded the treatment of property brought into the marriage. As a general principle, the fact that one spouse may have brought property into the marriage does not affect whether the property is classified as a family asset. The court, however, may reapportion entitlement to such an asset and many courts do so. It is not always clear what factors motivate the courts in exercising, or refusing to exercise, the discretion on this point.

The Working Paper suggested that pension division proceed on the basis that, at least as a starting point, only the portion of the pension acquired during the marriage should be divided.

Some felt that this variation would cause problems. Sometimes the only way to arrive at a division of family property that is fair overall is to divide the portion of the pension brought into the marriage. There may be no other property in the province, for example, that can be divided. Other problems might arise from treating different classes of family assets inconsistently:[42]

> Spouse A and B marry. Each has a pension. Spouse A's pension is collapsed and used as a down payment on the matrimonial home. Spouse B's pension is retained. On marriage breakdown, only the portion of the pension earned during marriage is divided, while the whole of the value of the house is divided between the spouses.

42. The example is based on *Miller* v. *Miller*, (1988) 18 R.F.L. (3d) 424, 430 (B.C.C.A.).

Problems like this can often be resolved by varying entitlement to other property. In the example, entitlement to the matrimonial home could be adjusted to reflect differences in contribution.[43]

Even under the Working Paper scheme, the court could divide the portion of the pension brought into the marriage, if there were no other way to arrive at a fair distribution of property. The draft legislation merely moves the starting point as to what portion of the pension is to be divided.

There were a number of reasons for revising the role of judicial discretion. Those in favour of a discretion tend to ignore its negative features. Every discretionary factor introduced into family property division seems to lead to disputes and, frequently, litigation. Moreover, it is difficult to see how courts (and lawyers) are to deal adequately with a discretion for dividing assets that are highly technical financial vehicles. Legal training does not provide much insight into how pensions operate, or how to value them. The kind of flexibility we see being enjoyed in pension division cases can be replaced by identifying an objectively fair result and letting the courts use a residual discretion for only the truly unusual case.

Using pension entitlement to adjust the division of property seems at first blush sensible. It is incorrect in terms of principle, however, to treat pensions like any other kind of property. Pensions are a special asset because they serve an important social purpose: they provide income on retirement. Legislation must provide for a fair division of this income source so that both spouse and member are protected. Shifting one person's retirement income to another to adjust general property rights is inconsistent with policy. For that reason, we believe that the focus must be on dividing other kinds of property first. Only in extraordinary circumstances should pension entitlement be reapportioned.

Those who argue that new legislation must treat pensions like other family assets seem to believe that the Working Paper suggested something novel in devising special rules for pensions.

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43. The current law, which holds that, as a starting point, the whole of the pension (including the part brought into the marriage) is equally divisible between spouses may equally lead to similar kinds of problems, simply because pensions are treated differently from all other kinds of family assets. Suppose when Spouse A and B marry Spouse A's pension is collapsed and invested in stocks which are never used for a family purpose and Spouse B's pension is retained. In this case, the *Family Relations Act* would divide the whole of Spouse B's pension equally between the spouses, while it is not clear that Spouse B has any claim to Spouse A's stocks.

In fact, pensions are not currently treated like other kinds of assets.

The usual rule is that property is divisible if it is ordinarily used for a family purpose, or if there is contribution to it. A pension is basically the only property treated as a family asset because the legislation deems it to be a family asset.[44]

With any asset brought into the marriage other than a pension, the court can examine the circumstances to determine whether it should be divisible at all. If a court decides that the property is divisible as a family asset, the court can also employ tests like the amount of use for a family purpose, or the degree of contribution, to determine fair shares.[45] But these principles cannot be applied to pensions. Those correspondents who argue that family property legislation must allow principles of division to remain flexible, should recognize that the current legislation seems to provide less scope for determining a fair share of pension entitlement brought into a marriage than for any other asset.

Currently pensions are given unique treatment simply because they are a special kind of asset. Revising legislation must also treat them differently. If our correspondents are arguing that pensions should be subject to a family purpose or contribution test, just like other family assets, we must disagree. If they are arguing that the portion of a pension brought into a marriage must be divided between the spouses because that is true for other assets, the comparison is simply incorrect.

4. A 50% Share

The Working Paper also suggested that spouse and member not be permitted to agree on dividing more than 50% of the pension. Some correspondents saw no problem with allocating more than a half share to the spouse, and felt that any limitation on the ability to do so would cause difficulties.

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44. FRA, s. 45 deals with special kinds of property: property which would be a family asset but which is owned by a corporation or subject to a power of appointment; money in a bank account where the bank account is used for family purposes; "ventures" to which there has been contribution; and pensions, annuities and registered savings plans. Only the last category are family assets without satisfying any of the usual tests for becoming a family asset.

45. Some courts adopt these approaches but there is, in fact, no uniform treatment adopted by the courts in dividing family assets or determining what portions they should be divided into: *see further, Report on Property Rights on Marriage Breakdown* (LRC 111, 1990) and *Working Paper on Property Rights on Marriage Breakdown* (No. 63, 1989).

It might be appropriate, for example, to give the spouse more than half where there is no other property, where there is other property but only the pension is in the province, or where it would allow a division in which each would receive separate assets. Suppose that the only assets are a business and the pension (such as a pension earned from an earlier career in, for example, the armed forces). If more than 50% of the pension could be transferred to the spouse, it might be possible for the member to retain the business.

Our reason for adopting the policy in the first place was to preserve the function of the asset as a pension, an issue mentioned in the last section. It was seen as inappropriate, and out of step with social policy, to allow a pension to be used to discharge other kinds of obligations. We continue to hold this view.

E. Matters of Detail

This section discusses specific points about proposals set out in the Working Paper, and other issues of concern to our correspondents.

1. Disability Benefits

Not all benefits offered under a pension will necessarily be paid. Like insurance, some benefits will only be paid if certain events take place. The part of a pension that provides disability benefits is a good example. It will become payable if, and only if, the member becomes disabled.[46]

Often disability benefits are provided separately from a pension, perhaps through private insurance, or as an employment benefit. Whatever the vehicle for the benefits, however, they are paid in the form of a continuing stream of income. Whether they are part of a pension package, or a separate employment benefit, they raise many of the same kinds of issues on marriage breakdown as retirement pensions do.

(a) Two Unresolved Problems

Under the current law, it is not always clear whether disability benefits qualify as family assets and, if so, how they

46. And often will be paid only so long as the member remains disabled.

should be divided. In some cases, a disability benefit is divided like a general pension. In other cases, courts have held that although a disability benefit is a family asset, it is not divided like a pension.[47] Some courts have held that a disability benefit may not be divided at all between the spouses.[48]

Two arguments have figured most prominently in reported cases. Courts that divide disability benefits as family assets have done so on the basis that no distinction can be drawn between an income stream that compensates for a disability and one that becomes payable on retirement from employment.

Courts refusing to find that disability benefits qualify as family assets have based their conclusion on the special, personal status of disability benefits, and the view that such benefits are intended to provide subsistence for the disabled member. It was for this reason that the Alberta Institute of Law Reform concluded that a disability benefit should not be divided at all.[49]

In the Working Paper, we suggested that disability benefits represent a complicating factor. Basically, the division of disability benefits does not lend itself to the kind of mechanism that should apply in the typical pension division case. It is likely that the court will be called upon to consider the special facts in each and every case in order to decide how disability benefits should be divided. The following comments were made in the Working Paper:[50]

> Currently, much court time is spent on the issue of whether disability benefits can be divided at all, so that simply determining by legislation whether these assets should be taken into account as a maintenance consideration or a property right would do a great deal of good. We tentatively favour their characterization as a family asset because Part 3 of the *Family Relations Act*, unlike the law governing maintenance awards, is flexible enough to deal with the kinds of problems that will arise in dividing such an asset.
>
> Enacting legislation to provide that a disability benefit is a family asset would have the consequence that, as a starting point, disability benefits would be equally divisible between the spouses, but the court is empowered under section 51 to come up with a different division that would be appropriate in the circumstances.

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47. In fact, in a number of the cases holding a disability benefit to be a family asset, the court reapportioned entitlement so that the disabled spouse retained the entire asset.
48. *See* the Working Paper, Chapter II.
49. Alberta Institute of Law Research and Reform, *Report on Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown* (No. 48, 1986) 32-3.
50. *See* Chapter IX.

(b) Response to the Working Paper Suggestions

The treatment of disability benefits was singled out for comment by many of our correspondents. The division of views that has emerged in the case law was reflected in the submissions we received. Some were opposed to dividing disability benefits at all. Some wanted them divided as if they were pensions. The majority of comment, however, shared our view that disability benefits require special treatment. Suggestions for new legislation focused on dealing with classes of disability benefits that most closely resemble the usual retirement pension.

First, it was suggested that a distinction should be drawn between disability benefits paid under pensions and those provided under insurance policies or as workers compensation. Those paid under a pension should be divided as other benefits under a pension:

> To the extent that disability benefits arise under a pension plan...we see no reason to treat them separately under Part 3. So long as any service benefits which accrue during disability, but after the triggering event, accrue to the member only and not to the limited member, and so long as the formula for division can be varied by the judge to meet the exceptional case, we are prepared to see disability benefits, which become payable under a pension plan, treated in the same manner as the pension itself.
>
> However, our agreement does not extend to disability insurance which is purchased privately by an insured (whether as an employment benefit or otherwise), to disability benefits payable by an employer (whether funded by insurance or not), nor to Workers' Compensation benefits (or similar benefits, such as C.P.P. disability pensions). We consider that such benefits are in substitution for an income stream from employment and should be taken into an account when determining maintenance rather than dealt with as a property right.

While we agree in principle with this position, one problem with dividing a disability benefit as a pension is that in some cases the disability benefit is for an uncertain duration. The amount paid under it, and the time for which it is paid, may depend upon the member's health. A partially disabled member may become worse and receive greater benefits or recover and end the income stream. These kinds of issues are not part of mainstream pension division legislation.

Some correspondents addressed this issue and suggested that a distinction should be made between disability benefits paid before the usual age for retirement and those paid after that

time (benefits paid after the usual age of retirement should be treated as pensions). We think a refinement like this would be a useful addition to pension division legislation.[51]

2. Non-Vested Benefits

An unresolved issue under the current law is how to value a non-vested pension.[52] The member may not stay employed long enough for the pension to vest. The value placed on the pension will vary substantially depending on whether or not it is assumed it will vest. For one reason, the portion of the benefits financed by employer contributions are forfeited if the member does not complete the vesting period. Some submissions suggested that legislation could usefully provide guidance on this issue.

The PBSA will require pensions to vest at a very early period.[53] In most cases, where there is a dispute between spouse and member, it will shortly become clear whether the pension vests. One solution, consequently, is for the legislation to adopt a "wait and see" approach (at the spouse's option).

Sometimes it may be necessary to finalize matters immediately. Valuing a pension weeks away from vesting as if it will never vest would be clearly unfair. Equally unfair would be valuing a pension years from vesting as if it were vested. Where valuation must proceed immediately, consequently, it must take into account the likelihood of vesting. This can be dealt with by valuing the pension assuming it will vest, but the value should then be adjusted to take into account the contingency that the member may die or leave employment before vesting.

3. Death Of The Spouse Or Member

Legislation dealing with pension division must necessarily address problems that arise when the spouse or member dies.

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51. A factor which will probably have to be considered in individual disability benefit cases is the determination of the spouse's share. Ordinarily, the spouse's share of a pension is determined by a fraction: half of the years of pensionable entitlement attributable to the marriage up to the triggering event divided by the years over which all pensionable entitlement accrued. Selecting an appropriate denominator for the fraction will not always be straightforward. In some cases, disability benefits are not paid immediately, but take the form of continued contributions to the pension so that when the member retires, it will be at a full pension. In such a case, the denominator should probably include all years over which pension entitlement accrues up to the date of retirement. In other cases, disability benefits are paid immediately. Consequently, two possible reference points can determine the denominator for the spouse's fractional interest. Which should determine the denominator will depend on the circumstances.

52. The issue arises when the pension is to be divided by a compensation payment.

53. By 1998, a pension must vest after two years of service, although the plan may require a period of two years service before an employee may become a member: ss. 79 and 81.

The permutations can be grouped by whether one of them dies before or after the spouse receives a share of the pension.

Once the spouse receives a share of the pension under an account split, neither the death of the member nor of the spouse can affect the entitlement of the other. The position is slightly different if the division is carried out by a benefit split. Entitlement will depend upon the form of the pension. In most cases, it will be a joint and last survivor pension. If the member dies first, the spouse will continue to receive survivor benefits.[54]

Where the member dies before the spouse receives any share of the pension, the spouse shares in whatever death or survivor benefits are available on the member's death.[55] A few correspondents observed that death and survivor benefits are sometimes very low.[56] One correspondent wrote:

> This payment of no death benefit or only a picayune amount provides no security to the spouse should the member die prior to retirement. In many provinces this is frequently handled by requiring extra security, possibly in the form of assigned life insurance if the member is insurable. If it is your intention to allow this to be covered in an outside separation agreement, you give no hint of that in the draft legislation.

In this project, our goal has been to devise a fair way of dividing pension benefits. Our focus, necessarily, has been on the benefits that are paid out by plans. It has not been on forcing plans to pay additional benefits, nor on mandatory division of other property to adjust a division of pension benefits. The concerns of our correspondent are not confined to pension division issues. Suppose, for example, that there were no pension. Any dependent spouse who is receiving maintenance is equally at risk. In any of these cases, providing security like insurance coverage

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54. What should happen if the spouse dies first? Should the spouse's estate continue to receive the payment of benefits? Our view is that benefits should cease with the spouse's death. That must certainly be the case where survivor benefits reduce on the death of the spouse. What if there is no reduction on death? It is in this case that the strongest argument can be raised in support of continuing benefits to the deceased's estate until the death of the survivor. However, the more sensitive the legislation is to variations like this, the more complicated it becomes. Many of our correspondents favoured as simple a scheme as possible, even at the cost of some logical inconsistency, and were critical of refinements that were difficult to comprehend. We discussed this policy earlier and will return to it again later in this Report. It is a policy that we have carried forward in some measure and that has shaped the final form of the recommended legislation.

55. Before there is a triggering event, however, the spouse will have no interest in the pension. In such a case, as under the current law, the beneficiary designation made by the member will determine who receives death or survivor benefits: *Gregory* v. *Gregory*, [1991] B.C.D. Civ. 1676-09 (S.C.). If the plan does not provide death or survivor benefits, there is nothing for the spouse to share. This follows from the policy of taking the plan as it exists, and only dividing benefits paid under it.

56. The PBSA, however, will require death benefits to meet defined standards, which may address part of the problem: *see* s. 34.

is probably a good idea. These are matters, however, which must necessarily be dealt with by the agreement of the spouses or by court order, taking into account all aspects of the separation of the financial relationship of the spouses.

The last group of issues concerns a spouse who dies before receiving a separate share of pension entitlement. The Working Paper suggested that the spouse's estate should still be entitled to receive from the plan a proportionate share of benefits payable when the member retires (or of the death and survivor benefits payable if the member dies before retirement). The Working Paper explained the policy in the following terms:[57]

> If pension entitlement served some kind of maintenance purpose, solely for the personal benefit of the spouse, there would appear to be no reason to continue the division of the pension after the spouse had died, particularly since the process of pension division necessarily subtracts from the interest in favour of the member. But the theoretical basis of pension entitlement in British Columbia under the *Family Relations Act* is that it is a property right. Property rights do not disappear on the death of the property owner. If the spouse, for example, becomes entitled to a share of the matrimonial home, the death of the spouse would not affect ownership. It would seem that a similar policy should apply to pension entitlement.

The majority of comment endorsed this approach, although one submission was concerned that it might cause administrative problems:

> We agree that the right of a limited member should not disappear if that spouse dies before the member retires. Our concern arises from the delay which might result in the administration of the limited member's estate if the member is (say) 20 years from retirement age. Cannot an appropriate portion of the usual death benefit become payable as the only right of the limited member's estate?

Upon reconsideration, we agree that it is not necessary to wait to satisfy the spouse's share in these circumstances. There is, however, a better alternative to calculating entitlement based on a proportionate share of a death benefit. The spouse's estate could receive a proportionate share of the commuted value of the member's pension (determined as of the date of the spouse's death). We have adopted the commuted value standard for other

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57. At pp. 75-6.

pension division purposes[58] and it is consistent to do so in this context as well.

4. Lump Sum Payments On Retirement

One commentator said that severance payments, such as those made on retirement from the armed services, are often sizeable and unmistakeably linked to the pension. It is unfair to the spouse, consequently, to exclude them from division. A related concern is that income tax rules place a limit on the size of a person's pension. In some cases high income earners receive a supplemental benefit, which functions exactly like a pension but may not be called a pension because of the tax position.

The label "severance payment" is slightly misleading. In some cases, the payment may compensate for leaving employment, or operate as an inducement to take early retirement. In either event it would properly be called a severance payment. In other cases, the payment is made to every member on retirement and is related to years of membership in the plan. Such a payment (frequently part of government pension plans) is probably more accurately characterized as a retirement benefit.

This project has as its single goal the development of a mechanism for resolving the special problems that arise when dividing benefits payable under a *pension*. We have already recommended to the government that all property acquired over the course of the marriage should be divisible, including severance payments and other supplemental benefits.[59]

Even so, it is possible that the courts will be able to resolve the problems of dealing with benefits that are provided separately from a pension but which have features in common with pension benefits. Recent cases have had to deal with these kinds of benefits under the existing legislation. A British Columbia case[60] has held that severance payments related to employment (as opposed to a gratuitous payment, or compensation for early dismissal) are family assets. An Ontario case[61] has held that a benefit to top up a pension is divisible as family property under

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58. *See supra*, Section C.2(c)(iii) "Termination Model: Deferred Termination Method." The commuted value of a pension, under the PBSA, is the value that would be transferred to the credit of the member when the member leaves employment and requests a transfer of pension entitlement to another financial vehicle for providing pension benefits.
59. *See Report on Division of Property on Marriage Breakdown* (LRC 111, 1990).
60. *Durling* v. *Durling*, [1991] B.C.J. No. 2694 (S.C.).
61. *Oswell* v. *Oswell*, (1990) 28 R.F.L. (3d) 10 (Ont. H.C.).

Ontario legislation. A British Columbia court would probably find this precedent persuasive.

5. Pension Division Alternatives

One meeting on the Working Paper focused almost exclusively on the issue of whether new legislation should set out alternative methods of pension division. A reason we put forward for adopting new methods of pension division were the problems unanswered by existing methods. But it was submitted to us that, at least with respect to the compensation payment method, the problems were overstated. In most cases, both sides could jointly retain an actuary to value the pension. The costs of the process would not be excessive if legislation set out assumptions necessary for valuation. Unfortunately, courts have not yet been able to provide guidance on the selection of appropriate valuation assumptions.

The approaches to pension division suggested in the Working Paper were not designed to prevent spouses from agreeing, if they wished, on other methods of pension division that did not directly affect the plan. The draft legislation in the Working Paper scheme, consequently, included a section allowing the spouses to agree on an appropriate compensation payment. Moreover, the suggested legislation is to work in the context of the *Family Relations Act*, which empowers courts to adjust the division of property by making a compensation payment.

Part of the problem, and this was underscored by one correspondent in particular, is that unless legislation resolves various valuation issues beyond doubt, one of two possible consequences could be expected. The courts would be asked to resolve the valuation issues, a process which has not been noticeably successful under the current legislation. Or the spouse and member might simply abandon the option of dividing a pension through a compensation payment and settle on a less desirable alternative.[62] Valuation principles endorsed in one British Columbia case[63] result in a compensation payment that is significantly less than the present value of the future benefits that the spouse and member are to share. This case has been criticized because it seems to

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62. Where there are sufficient assets in an estate, a compensation payment is often the method the best serves the interests of both spouse and member, since it effectively separates the last ties between them.

63. *Stokes* v. *Stokes*, (1986) 8 B.C.L.R. (2d) 80 (C.A.).

be based on a misunderstanding of the accepted actuarial principles involved.[64]

We see the advantages of providing clearer valuation guidelines. Draft regulations set out in Chapter V clarify some of the more contentious valuation issues.

6. Small Pensions

It is not too difficult to imagine a member's pension being divided again, when a later marriage fails. After a while, the pension fragments may be too small to be worth administering. The PBSA allows a plan to transfer pension entitlement (to another plan or RRSP, for example) where the member leaves employment and the pension's value is beneath a defined threshold.[65] One submission suggested that the plan should also have the option of paying out the commuted value of pension fragments belonging to limited members. We think this is a useful idea. The option forms part of the draft legislation recommended in this Report.

7. Portability And The Spouse's Share

The PBSA will allow members portability. A member who leaves employment can have pension entitlement transferred to another plan. Two correspondents were concerned whether portability might adversely affect the rights of a spouse. One wrote:

> I am not sure what is contemplated if [an unmatured pension in a defined benefit plan] is portable and the member asports it, or at least the member's share. It looks to me as if the draft would continue to speak in respect of the spouse's right to a separate pension, which would mean that the plan would continue to be responsible for the provision of the separate pension despite the asportation of the member's share. If so, I am not sure
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> - what the member's "retirement" would then mean in respect to the first pension plan
> - whether the member's death would trigger a survivor's benefit
> - whether pension plan provisions for the valuation of what the member takes away would necessarily mesh properly with a situation in which that is only part of the entitlement.

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64. No case has challenged the decision, but this should not be interpreted as an endorsement. In practice, it appears that it has forced most spouses to accept a division of the pension through a benefit split. The absence of any later consideration of the issue is a reflection of the cost of carrying the litigation to the Court of Appeal and, in all likelihood, the Supreme Court of Canada. In very few cases is pension entitlement sufficiently valuable to justify those costs. It is unfortunate that the Supreme Court of Canada denied leave to appeal in the *Stokes* case.

65. PBSA, s. 33(5).

The Working Paper suggested that the plan must advise the limited member of any change in the status of the pension (the draft legislation provided for 30 days prior notice). In this way, the limited member would have ample opportunity to assert rights to a portion of the pension paid out (the suggested scheme permitted the spouse to share in any "benefit" under the plan). For greater certainty, in the draft recommended in this Report, the definition of benefit has been revised to clearly encompass a refund or transfer of contributions from the plan. A proportionate share of such a benefit would be paid to another plan or institution to the credit of the spouse, and be used to provide the spouse with retirement income. The plan would not be required to deal with the limited member once the member leaves it.

8. Ambit Of The Legislation

Many people thought the legislation should state more clearly which pensions are subject to it. Even under the current law, the question of whether provincial or federal law is to apply can arise.

For example, some undertakings that have federal and provincial elements play their status off so that if a spouse seeks a provincial remedy, it is resisted on the basis that the business is a federal undertaking. If the spouse relies on the federal PBSA, however, the business will take the position that it is subject only to provincial legislation.

It would be nice to have a comprehensive list but, unfortunately, the court's competence is an issue which turns on constitutional and jurisdictional matters. Compiling such a list would require some speculation concerning how particular principles would apply in discrete circumstances and, at the end, would not advance the issue. If the province has not the competence to affect the plan in question, its inclusion on such a list would be meaningless.

A submission from one group objected to the enactment of provincial legislation on pension division since the legislation can directly affect only a small number of pensions. It was suggested that legislation on a national basis was called for.[66] En-

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66. One advantage to pension division legislation on a national basis is that uniform pension division techniques would apply. Provincial legislation, if it wishes to be comprehensive, must apply different methods to plans that are subject to its legislation and to those that are not. *(cont...)*

titlement to family property is a matter that is exclusively within the jurisdiction of the provincial governments. Legislation must operate within existing constitutional strictures.

Even so, the draft legislation set out in the Working Paper was comprehensive. Although not all techniques could be applied to all pensions, any pension could be divided (in one way or another) under the legislation. The draft legislation set out a number of factors where, ordinarily, the legislation should apply. But what it comes down to, basically, is that where the court has the jurisdiction to make an order affecting the plan, one set of pension division rules apply. Where it lacks that jurisdiction, the court's order is directed not at the plan but at the spouse and member instead.

Some concerns were voiced over how the provincial legislation would affect extraprovincial plans which, for one reason or another, would be subject to it (the draft legislation speaks of the provincial PBSA, but extraprovincial plans will be subject to other equivalent legislation in their home jurisdictions). For example, the federal PBSA provides that some federal plans are subject to provincial law for the purposes of pension division. Some aspects of the legislation are confusing because the federal government incorporates provincial law by reference.

We acknowledge the point but do not think that provincial legislation must be (or for that matter can be) tailored to avoid these kinds of problems. When other legislation is incorporated by reference, the usual principle is that it applies to the extent that it can and with necessary changes otherwise (*mutatis mutandis*). Any problems that cannot be resolved in that way should probably be resolved by the jurisdiction whose legislation creates the problem.

Submissions were also made to the effect that federal plans should be exempt under the provincial legislation. But the only reason federal plans would fall within the provincial legislation is because federal legislation dictates that result. Any exemption, consequently, would appear to be a federal responsibility.

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66. *(...cont.)* Unfortunately, a national approach would likely adopt techniques for pension division that are entirely at odds with the current methods being used in British Columbia. The national standard currently appears to be based on the termination method.

9. Mature Pensions

The Working Paper proposed that the legislation not apply to cases where pension division has already taken place and the member has retired, a position based on two considerations. It was felt, first, that it was inappropriate to upset settled arrangements. Moreover, where the member has retired, all decisions upon which there can be a conflict between the member and the spouse are resolved. The date of retirement and the form of the pension have necessarily been selected. Some groups disagreed:

> To the question "Why upset a settled arrangement?" our response is that this reasoning perpetuates the confusing situation which currently exists under *Rutherford*. [The fact that the member is the trustee of the spouse's interest and there are no separate pension accounts, *inter alia*.]

This submission may be based on a misapprehension. It was contemplated in the Working Paper that where the pension had matured before marriage breakdown, the administrator of the plan would divide the monthly cheque between the spouse and member, removing the need for the member to be "the trustee of the spouse's interest." Possibly, our correspondent is addressing issues that arise where the pension is divided before the new legislation for pension division comes into force but the member has not yet retired. The possibilities of "opting in" to the new legislation are discussed later in this Chapter.

10. Cashing Out The Pension

A suggestion made on several occasions was that legislation should also allow the pension to be cashed out on marriage breakdown, in this way placing (often much needed) money in the hands of the spouse.

This option is entirely at odds with the social policy regarding pensions discussed above. Pension division is premised on the idea that retirement income is important for both the spouse and member so that a fund for retirement, such as monies in a pension, should retain that character. Pension division legislation must not be used to wind up retirement savings.

11. Tax

Several people were concerned that the Commission had not addressed the tax implications of pension division. But all pension division must be performed against a background of tax considerations. Little is to be gained by tailoring pension division to existing tax policy since it has changed, and will likely continue to evolve, to accommodate the mechanisms that are being developed.

Even so, one person suggested that the legislation must clarify at least one matter:

> To avoid dealing with tax aspects by separation agreement or court order, the legislation might require the plan administrator to source report the two pensions separately so that each spouse automatically pays the tax on the appropriate proportion.

We agree with this suggestion and have incorporated it in the draft pension division legislation.

12. Transition

The legislation is aimed at resolving problems that arise after it comes into force. To what extent should it apply to arrangements made under previous law?

Usually new legislation leaves rights arising under the old law alone. Correspondents suggested, however, that in some cases it would benefit the spouse, member and the plan if the new techniques of pension division applied. The new legislation, for example, provides the spouse with both security and a mechanism for enforcing pension entitlement. A deferred account split also solves at least some of the tax difficulties that currently exist under a benefit split. And where a pension is divided by a benefit split before the new legislation comes into force, there is an issue respecting the effect of a later marriage breakdown on the existing arrangements that is also resolved by the new legislation.

It is useful, consequently, to consider situations where some, or all, of the new legislation might apply to pension division cases arising before it comes into force.

(a) Pension Issues are Unresolved

Suppose in a particular case the issue of pension division is still at large when the legislation comes into force. The question of interfering with settled arrangements does not arise. Is there any reason the new legislation should not govern?

The sole source of problems would appear to be cases where it might be difficult to establish whether or not there is a final agreement on pension division. The spouse and member may agree, for example, that the spouse will receive a certain sum of money. In exchange, the spouse waives all rights under Part 3 of the *Family Relations Act*, without specifically mentioning pension rights. If pension entitlement has been overlooked, possibly the spouse should not be bound by the release. Some British Columbia decisions have proceeded on this basis. If pension entitlement, however, was specifically in mind when the spouse waived rights to family assets, it would be improper to upset the earlier arrangement.

While admittedly difficult, these are issues which arise even now. We are confident the courts can deal with them. The few difficulties that may arise are more than offset by the problems that will be resolved only by extending the new legislation to cases that first arise before the legislation comes into force.

In our view, if there is no final court order or agreement that settles pension division, the new pension division methods should be available.

(b) Benefit Splits

Suppose that before the new legislation comes into force, the spouse and member agree (or the court orders) that the pension will be divided by a benefit split, but nothing more has happened. The member has not yet retired and the spouse has not exercised an option (if any) to receive "early retirement" payments from the member. Is there any advantage to making the new legislation available in these circumstances?

Little danger would seem to exist in changing the arrangement to an account split under the new legislation. Even so, there is the risk of reopening settled affairs which, between spouses, are often resolved only after lengthy and acrimonious disputes. The new legislation, for that reason, should not be

automatically available. But there is no reason why the spouse and member should not be allowed to opt in, by agreement. Since nothing has yet taken place, no third party interests can be harmed by allowing the spouses to decide on a different method of dividing the pension.

One aspect of the new legislation should be available even if the spouse and member do not agree to change the method of pension division. The chief drawback of a benefit split under the current law is that it is carried out by the member. In our view, a spouse should be allowed to elect to have the benefits divided by the plan at source. The division should, however, follow the terms of the agreement or court order establishing the benefit split. The plan should be entitled to appropriate notice completed by the member and the spouse. If the member refuses to cooperate, the spouse can apply to court for an appropriate order.

Similarly, even if the member has retired, or the spouse is receiving "early retirement" benefits from the member, there is no reason why the spouse must rely upon the member to carry out the benefit split. A spouse should be allowed to elect to have the benefits divided by the plan at source in this situation as well.[67]

(c) Other Methods of Division

The spouse and member may have agreed to divide the pension by some method other than a benefit split. Entitlement might be satisfied, for example, by the payment of compensation or the plan might provide a method of pension division. If the pension is to be divided in one of these ways, allowing new legislation to apply would only reopen settled matters, which cannot be good policy. In the first case, both spouse and member will have relied upon the finality of the transaction. In the second case, the plan is involved and will be prejudiced by any change in the existing arrangements.

Suppose the spouses have entered into a binding agreement for one of these kinds of pension division, but it has not yet been carried out? Again, we are of the view that it is better policy not to reopen settled matters.

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67. The plan would not become involved in this case, of course, until the member actually retires.

(d) Summary

In a few, well defined situations, the new legislation can resolve problems in pension division cases arising before the legislation comes into force. If no decision has been made on how to divide the pension, the new legislation should apply. If the spouse and member have decided on a benefit split, but benefits are not yet being paid, they may agree to opt in to the new legislation. Even if it is not necessary for all parts of the new legislation to apply, where the division is being carried out by a benefit split it should be possible to have the pension divided at source.

13. Canada Pension Plan And Opting Out

Usually, the spouse and member may agree on whether to divide a pension or satisfy pension entitlement in some other way. This is not the case under the Canada Pension Plan. Pension entitlement under the Canada Pension Plan is automatically divisible between the spouses on marriage breakdown. The federal legislation lets each province decide whether spouses can waive entitlement.

Our correspondents were divided on whether spouses should be able to agree on dividing CPP benefits. One group of lawyers told us that practice was well established: the client is advised about rights under the CPP. Entitlement is not dealt with in the agreement or the court order. It is up to the spouse to apply to the plan for a share.

Some felt that spouses give up pension rights too cheaply, partly because a non-working spouse is often a victim in family property negotiations and partly because the need for retirement income is not recognized during the marriage breakdown.

Others told us that they routinely prepare agreements under which the spouse waives rights in the Canada Pension Plan.[68] If that is what people are doing, the question was asked, why shouldn't the law allow them to do it? The real need in this respect is a safeguard against unconscionable agreements, which the court has generally under sections 51 and 54 of the *Family Relations Act*. One group wrote:

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68. Statistics up to 1986 show that few divorcing spouses request a division of unadjusted pensionable earnings under the Canada Pension Plan: *see, e.g.*, Alberta Law Reform Institute, *Division of Canada Pension Plan Credits* (Report No. 58, 1990) at 12.

> With the safeguard of a specific agreement (as opposed to merely a general waiver), we agree that a spouse should be permitted to waive the right to a division under the Canada Pension Plan.

Since the Working Paper was published, the Alberta Law Reform Institute has recommended spouses not be able to opt out of the automatic division.

We have reconsidered this issue but remain of the view that the spouse and member should be able to settle their affairs by agreement. It was surprising to find that many correspondents who were opposed to an objective method of dividing pensions (citing the need for flexibility) were equally adamant that there should be no ability to waive entitlement to Canada Pension Plan benefits. The inconsistency is striking. In our view, while legislation should set out in clear and certain terms how pensions are to be divided, spouse and member should still have the right to determine that issue for themselves by agreement.

One correspondent argued that waiver is not a good idea and cited an example where the only income available to the spouse during a protracted dispute was the pension entitlement under the Canada Pension Plan. The approach we recommend would not alter the spouse's ability to apply unilaterally for a share of Canada Pension Plan benefits. The statutory ability to decide matters by agreement arises only when a spouse decides that it might be worthwhile to trade pension rights for something else.

One submission commented on the federal legislation's requirement that any waiver authorized under provincial legislation must specifically waive rights under the statute:

> It may well be that a court would hold that a document that says "I waive my rights under the Canada Pension Plan" expressly mentions the statute and indicates the intention of the parties that there be no division of unadjusted pensionable earnings under specific sections of the CPP statute, but I wonder whether it would not be better to avoid confusion and possible litigation by using similar wording [to the section in the *Canada Pension Plan Act*] or incorporating by reference.

The draft legislation has been amended to deal with this technical point.

14. SIMPLICITY

Several correspondents stressed that pension division legislation must be simple. One person wrote:

> It is important to keep the process simple and straightforward [for] members to understand their entitlement.

This comment was offered in support of the termination method of pension division, which usually results in putting too small a value on the spouse's share.

Another submission made the following points:

> We believe the legislation providing that ex-spouses have vested rights in plans regardless of the death of the member is legislation which is long overdue and is a valuable reform. We believe that spouses should have the right to contract out and we believe that they should have the right to suggest as wide a variety of options as are consonant with the economical operation of any plan. However, with respect, we do not believe that the scheme suggested in the working paper has the desired ability of simplicity. We believe that simplicity is necessary for the proper dissemination of information to lay persons regarding their rights and obligations in pensions and we believe that simplicity of any proposed pension scheme is necessary to protect the rights of such persons. We believe that reforms can be enacted without the necessity of a new and complex regime.

But this group did not tell us what reforms they had in mind. Our review in the Working Paper of existing methods of pension division in other jurisdictions shows that simple methods are often unfair methods (generally, they arrive at too small a share for the spouse, like the basic termination method mentioned above, or are based on a maintenance model which provides the spouse with no security). Other "simple" methods have not been adopted because they have the potential to cause financial difficulties with some plans (such as those proceeding on the idea of an immediate payment out of pension entitlement from a plan based on a present value calculation of the future value of the pension) and a great deal of expense (since they require individually tailored schemes devised by experts each time there is a division of a pension).

Those who advocated a simple solution sometimes seemed to proceed with inadequate information on current methods. One person advised us that a method being employed was simple and understandable. Basically, "the Plan's Actuary will determine the amount of pension the ex-wife would be entitled to." While

we agree that the solution must be as simple as possible, any method becomes complex as soon as one examines the decisions that must be made to appropriate the specific share to the spouse. Revising legislation must be sufficiently particular to tell the actuary how to make these calculations. But the spouse and member do not have to master all of the legislation (dealing with all conceivable kinds of pension plans) to understand their separate entitlement. There is a need for pension legislation to arrive at not only a fair but a workable solution. Unless it provides clear guidelines, the scheme will only lead to controversy and litigation to deal with unanswered problems.[69]

Many think of a benefit split as being fairly simple, and courts often order a division in this way without any regard to its particular features. But a brief examination of a text[70] dealing with the preparation of agreements dividing pensions by a benefit split quickly reveals that several pages of intricately drafted clauses are necessary to make it work. It should not surprise anyone that legislation setting out to provide an accurate system of pension division will also have its fair measure of length and difficulty. Pension legislation is necessarily complex because pensions are complicated financial arrangements, and because there is much variety in the kinds of pensions that exist.

For every correspondent who called for simplicity, another asked that the legislation deal with more issues to leave as few unanswered questions as possible. Some submissions doubted that legislation could provide objective answers to pension division questions simply because of the variety that exists in this field. Obviously, those who set out to provide a legislative solution for pension division are required to walk a very fine line.

It should be observed that the majority of comment we received agreed with the directions suggested in the Working Paper for revising the law.

How can the legislation meet the conflicting goals of setting out a scheme that is not only comprehensive but understandable? One response set out earlier in this Report is to streamline the model for pension division. Much complexity arises from trying to parallel the spouse's interest with that of the member's. Shift-

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69. Correspondents who think a system without guidelines is simpler are mistaken. The current law appears simple to some, but a review of cases discloses instead uncertainties, fundamental misconceptions and layers of complexity in pension division. *See* Appendix B.

70. *See, e.g., Family Law Agreements Manual* (CLE, 1986) Chapter 14.

ing the focus to providing a fair share of pension entitlement, although without the benefit of some options concerning the form of the pension, protects the interest of the spouse within a comprehensible structure.

Another technique is to use regulations to deal with many of the more complicated, nuts and bolts aspects of pension division. In this way, legislation can provide a more easily understandable overview of pension division, in terms of basic principles. And yet, the answers to the difficult questions that must be addressed are readily available to anyone who checks the regulations.

Another method is to adopt, wherever possible, a single solution to deal with groups of related problems in preference to a series of complex options that turn on subtle shades of difference.[71]

We have used these techniques in preparing a legislative model for pension division. Our recommendations take the form of draft legislation and draft regulations. We hope that this approach will go at least some way toward meeting the natural concerns of our correspondents.

71. It is possible, *e.g.*, to construct different methods of determining the spouse's share of a pension in a defined benefit plan depending upon whether it is a flat benefit plan, a career average plan, or based on the average of salaries paid in a defined number of years (such as the best five years, or the final five years). Instead, however, we have adopted a single objectively fair solution, based on prorating pension entitlement, to determine the spouse's share in all of these cases.

CHAPTER V DRAFT LEGISLATION AND REGULATIONS

A. Introduction

This Chapter sets out draft legislation and regulations dealing with the division of pensions on marriage breakdown. It is our recommendation that legislation embodying the principles set out in the draft legislation should be enacted in British Columbia.

The draft legislation is extensively annotated, but it is useful to say a few words by way of introduction to it. The main themes for pension division that were explored in the Working Paper remain a part of the draft legislation. Significant changes have been introduced in response to the concerns raised in the process of consultation following the publication of the Working Paper. Even so, we do not expect all groups will welcome the legislation. People speaking on behalf of plans, for example, resisted the idea of any form of pension division legislation that directly involves the plans. It should be recognized that any legislation dealing with pension division, just like any legislation dealing with family property issues generally, will prove to be controversial.

Nevertheless, we are convinced that the legislation set out in this Chapter balances the legitimate interests and concerns of those affected when a marriage breaks down and pension entitlement must be divided between spouse and member. Attempts have been made to safeguard plans by ensuring that the value paid out in the form of pension entitlement will not exceed the value that would have been paid out had their been no division at all. Moreover, revisions have been made to minimize the cost implications to a plan of pension division.

With respect to the balance of rights between spouse and member, we believe that their individual interests are best served by a system that fully separates their financial dealings. To the extent the province is capable of enacting legislation on this issue, the account splitting process described in this Report will accomplish that.

B. Summary of Principles

We have made the following conclusions (in the form of principles) in this Report concerning the general outlines of pension division legislation:

1. Plan involvement is a necessary feature of pension division.

2. Pension division legislation should ensure that the value payable to the spouse and member under a divided pension does not exceed the value that would have been payable to the member if the pension had remained intact.

3. Pension division legislation should require the spouse and member to pay a prescribed amount to offset the costs plans will incur in administering a divided pension.

4. Pension division legislation should provide a streamlined, unadorned pension division model, to minimize the administrative demands on plans while continuing to protect the interests of the spouse and member.

5. As a usual rule, a pension in a local unmatured defined benefit plan should be divided by a deferred account split when the member retires.

6. A spouse who wishes to have a pension in a local defined benefit plan begin before the member decides to retire, should be able to elect to have a proportionate share of the commuted value of the pension transferred from the plan to the credit of the spouse.

7. The commuted value under Principle 6 should be determined as of the date selected by the spouse for the transfer, as though the member had left employment on that date and requested a transfer of the pension entitlement under the Pension Benefits Standards Act.

8. The transfer under Principle 6 should be governed by the same rules which govern the transfer of commuted value of a pension from a plan to the credit of a member, under the Pension Benefits Standards Act.

9. The transfer under Principle 6 should not be available any earlier than the date the member first becomes entitled to elect to retire and receive pension benefits.

These conclusions reflect decisions at the highest level of generality. The following legislation and regulations attempt to give them form. In the process of drafting the legislation, numerous additional decisions have been made relating to the policy and procedure of pension division. We have adopted this method of setting out our conclusions since it is both efficient and it has given us an opportunity to explore methods of drafting that might make the process of pension division more comprehensible to people who are not expert in this area. Even so, it is the principles embodied in the legislation and not their form which we recommend for adoption. Legislative counsel should not regard themselves as bound by the drafting conventions we have adopted.

The Commission recommends that:

> *Legislation should be enacted that embodies the principles of the draft legislation set out in Chapter V of this Report.*

C. Schematic Summary of the Legislation and Examples

As a guide to the draft legislation, we have prepared several diagrams. These diagrams show:

- how to determine whether a pension is in a local plan or an extraprovincial plan,
- how to divide a pension in an extraprovincial plan,
- how to divide a pension in a local plan.

The reader might find it helpful to review these diagrams before studying the draft legislation in the next section. They are to be found in Appendix F.

As a further guide to the draft legislation, a series of examples have been prepared showing how various pensions in different kinds of plans would be divided under it. The examples are in Appendix E.

D. Draft Legislation and Regulations

DRAFT LEGISLATION:
DIVISION OF PENSIONS ON MARRIAGE BREAKDOWN

1. The *Family Relations Act* be amended

(1) to provide that a court has jurisdiction to vary the manner in which a pension is divided under Part 3.1; and

(2) to provide that where the division of a pension under Part 3.1 would be unfair, having regard to

(a) the factors set out in section 51, or

(b) the exclusion from division of the portion of a pension earned before the marriage

the court may divide the excluded portion between the spouse and member if it is inconvenient to adjust the division by reapportioning entitlement to another asset.

Currently, B.C. law states that all of the pension earned up to marriage breakdown, including any portion earned before marriage, is a family asset and divisible between the spouses. The court, however, may in appropriate cases, adjust the division to exclude the portion brought into the marriage.

This policy is altered under the draft legislation. The goal is to devise legislation which does not require court proceedings to operate. For one reason, few people, including judges and lawyers, feel comfortable dealing with the technical intricacies of pension division and B.C. case law is riddled with inconsistent decisions as a result.

Nevertheless, in some cases the only way to adjust property rights between the spouses will be by dividing the part of the pension earned before marriage. The court has jurisdiction to do this, but should prefer, if possible, to balance rights by dividing other kinds of assets (which are often simpler to share since, unlike pensions, they can usually be converted into cash.)

2. The *Family Relations Act* be amended by adding a new Part 3.1 as follows:

The new Part 3.1 sets out the mechanics of pension division. One significant departure from the Working Paper: much of the nuts and bolts of pension division has been removed from the legislation and placed in regulations. Draft regulations follow the draft legislation.

PART 3.1

DIVISION OF PENSIONS

Definitions

55.1 In this Part

"administrator" means the person or body who is considered to be an **administrator** under the *Pension Benefits Standards Act*,

Where possible, the draft legislation adopts the definition or usage employed in the *Pension Benefits Standards Act* ("PBSA"). In some cases, the draft legislation will apply to plans governed by similar legislation in other jurisdictions. In such a case, the PBSA should apply, with necessary changes, to the extent that it is applicable.

Bold face is used conventionally to indicate that the term is defined in the draft legislation.

"beneficiary" means a person or the estate of a **member** entitled under the terms of the **plan** to receive **preretirement** or **postretirement survivor benefits** under the **plan** on the death of the **member**,

"Survivor benefits" are defined to include lump sum benefits normally referred to as death benefits. Usage here is patterned after the PBSA.

"benefit" means a **pension** or any other **benefit** under a **plan**, and includes a return of contributions, a transfer of the **commuted value** of a **pension**, **preretirement survivor benefits**, **postretirement survivor benefits**, postretirement adjustments to benefits and any payment in a series of payments that constitutes a **benefit**,

The definition refers to a transfer of commuted value, and specifically designates survivor benefits to be benefits under a plan. Correspondents were concerned whether a spouse was adequately protected if a member transferred pension entitlement to another plan, or where survivor benefits were paid to a third party. Under the draft legislation, a limited member is entitled to a proportionate share of benefits paid under a pension (s. 55.3(2)(a)). A spouse designated to be a limited member will share in the two situations mentioned above.

In another change from the Working Paper, the reference to disability benefits is omitted. These are dealt with in a different way: see s. 55.8 and the definitions of "disability benefit" and "matured pension." A disability benefit is divided by a benefit split when the member reaches an age based on the average age of retirement. See Regulation 11.

Otherwise, the definition of "benefit" is derived from the definition under the PBSA. That Act uses a collection of terms to refer to different features of pensions: "plan" refers to the whole fund and all of the interests of members in the plan. A "pension" is the retirement annuity in favour of a particular member but, it seems, includes no other benefits paid or payable to the member or a beneficiary. "Benefit" is the comprehensive term for all benefits paid or payable to the member or a beneficiary. These definitions are adopted in the draft legislation and set out below.

"commuted value" means the value of a **benefit** determined in accordance with the regulations,

Under the draft Act and the Regulations that follow, the commuted value of a pension is determined in the same manner as if the member terminated employment and applied to have the value of the pension transferred to another plan, etc. In some cases, the spouse is entitled to have a share of the commuted value paid out to satisfy pension entitlement.

The PBSA will set out regulations to calculate the commuted value of pensions and benefits. Commuted value is similar to, but not exactly the same idea, as the present value of a benefit, since commuted value is based on determining minimum transfer values where a member wishes to move pension entitlement from one plan to another. Even so, it is useful to tie into the PBSA on this point. Any concern that a spouse is undercompensated by this approach is met by deferring the calculation and transfer of a proportionate share of the commuted value of the pension or a benefit.

This option is provided in place of allowing a spouse to remain a limited member of a plan and take early retirement. If a spouse wishes, the spouse can remain in the member's plan and take the benefits in the form of a pension when the member retires. If the member dies before retirement, the spouse is entitled to a share of the death and survivor benefits payable (if any) under the member's pension. See s. 55.7.

"defined benefit plan" means a **plan** that is not a **defined contribution plan** or a **hybrid plan**,

A hybrid plan determines benefits payable under it partly by reference to contributions and partly by a benefit formula. See the definition of hybrid plan.

"defined contribution plan" means a **plan** under which **benefits** are determined solely by reference to what is provided by

(a) contributions made by a **member** and on a **member's** behalf by an employer, and

(b) **net investment returns** and other amounts allocated or to be allocated in respect of the contributions,

"Defined contribution plan" is based on the definition under the PBSA.

See Regulation 5 and s. 55.4.

See the definition of "net investment returns."

"disability benefit" means any monthly **benefit** paid to a **member** under a **plan** as a consequence of a disability,

"Disability benefit" is used in the definition of "matured pension." "Disability benefits" are divided by a benefit split when the member reaches an age based on the average age of retirement. See Regulation 11 and s. 55.8.

"extraprovincial plan" means a **plan** that is not a **local plan**,

Not all pensions can be reached by a court order. The term "extraprovincial plan" is used to refer to those that cannot be.

A spouse's interest in an extraprovincial plan must be satisfied by a method that does not directly affect the plan, such as a benefit split or the payment of compensation. See s. 55.6.

"hybrid plan" means a **plan** under which either

(a) some but not all of the **benefits** are determined as if the **plan** were a **defined contribution plan**, or

(b) the **member** can choose on retirement between having the **pension** based on either contributions or a defined benefit formula,

A hybrid plan either mixes the features of the main two plans, or provides the member with alternative methods of calculating pension benefits. S. 55.14(1) deals with how a hybrid plan is divided.

"limited member" means a person designated under section 55.3,

In certain cases a spouse of a member may be designated a "limited member" of the plan. A limited member has some of the rights of a member.

"local plan" means a **plan** that is

(a) established by the province,

(b) required to be registered under the *Pension Benefits Standards Act*, or

(c) subject to this Part

(i) by the terms of the **plan**,

(ii) by operation of legislation regulating the **plan**, or

(iii) by reason of a reciprocal agreement under the *Pension Benefits Standards Act*.

"Local plans" can be reached by a British Columbia court's order. The term "local plan" is slightly misleading because in some cases a federal plan or a plan located outside the province may qualify as a "local plan."

See s. 5 of the PBSA.

"matured pension" means a **pension** under which **benefits** are being paid to a retired **member** or **beneficiary** and includes a payment of **disability benefits** when the **member** reaches a prescribed age, and **"mature"** with reference to a pension has a corresponding meaning.

A pension has three stages of life. When a member first joins the plan, the pension is non-vested. After a member contributes to the pension for a particular period of time it becomes vested ("vested pension" is defined). Once a member retires, the pension becomes a "matured pension."

The spouse shares disability benefits when the member reaches 63. See Regulation 11 and s. 55.8.

"member" means a person on whose behalf contributions to a **plan** have been made or who has a **vested** or **matured pension**,

Strictly speaking, everything after the word "plan" is probably unnecessary, but the definition tracks ideas set out in the corresponding definition in the PBSA.

"**net investment returns**" means interest, dividends and realized and unrealized capital gains and losses, less related investment expenses normally charged to investment earnings,

This definition is used to refer to earnings on contributions made to a plan on behalf of a member. See the definition of "defined contribution plan." See Regulation 5 and s. 55.4.

"**pension**" means a series of payments pursuant to a **plan** that continues either for a term of years or for the life of a **member** or former **member**, whether or not it is afterward continued to any other person,

"**pensionable service**" means the months or parts of months in respect of which **pension** entitlement in favour of a **member** accrues, and includes **pensionable service** associated with **pension** entitlement earned by a **member** under another **plan**, that has been transferred to the credit of the **member**,

The definition formerly applied different tests for determining "pensionable service" depending on whether the plan was a defined benefit plan or a defined contribution plan. Now that the legislation also deals with hybrid plans, introducing a third branch of the definition made the whole approach highly technical and that much more difficult to comprehend. This draft adopts a unified definition.

The conclusion of the definition is necessary to deal with the division of pensions where entitlement has been transferred from another plan.

"**plan**" means a **plan**, scheme or arrangement organized and administered to provide **pensions** for employees and former employees,

In the Working Paper draft, this definition was assigned to the terms "pension plan" or "plan," following the pattern of the PBSA. The draft legislation does not employ the phrase "pension plan" and so the term has been omitted here.

"postretirement survivor benefits" means lump sum or periodic **benefits** paid by a **plan** to a **beneficiary** when a **member** dies after the **pension matures**,

The definition includes any benefit paid on the death of a retired member. Although the word "survivor" is used, the term also includes lump sum payments normally referred to as "death benefits." The term, consequently, runs counter to common usage. It is used because the PBSA has adopted it. See s. 35 of the PBSA.

"Benefit" and "mature" are defined.

"preretirement survivor benefits" means lump sum or periodic **benefits** paid by a **plan** to a **beneficiary** when a **member** dies before the **pension matures**,

The definition includes any benefit paid on the death of a member before the member retires, including lump sum benefits normally referred to as "death benefits." The term, consequently, runs counter to common usage. It is used because the PBSA has adopted it. See s. 34 of the PBSA.

"Benefit" and "mature" are defined.

"proportionate share" means a fractional interest calculated in accordance with

(a) the regulations,

(b) a court order, or

(c) the agreement of the **spouse** and **member**.

The "proportionate share" is determined as a ratio of time periods (roughly length of marriage divided by length of membership in the plan). This fraction determines the divisible portion of the pension (the spouse receives half of it). "Proportionate share" is a familiar idea since it is the heart of a benefit split under a *Rutherford* order. In the Working Paper, this idea was addressed in the body of the legislation, in s. 55.8. In this draft, it is included in the Regulations. See Regulation 2. It is used to determine the spouse's share of benefits under a pension, a separate pension, or a share of the commuted value of the pension and applies to all defined benefit and defined contribution plans. The court has a discretion to depart from the guidelines set out in the legislation, under Part 3 of the *Family Relations Act*. The spouse and member are able to agree on a number of matters relating to pension division: see s. 55.10(1).

"retirement" means the date a **member** commences to receive a pension under a **plan**, whether or not the receipt of **benefits** has been deferred, and **"retire"** has a corresponding meaning,

Self-explanatory.

"separate pension" means the share of a member's **pension** established in a separate account in favour of a **spouse** under section 55.5,

Changes in this definition from the Working Paper version reflect the different drafting approach adopted for this version.

S. 55.5 provides for an account split, under which, essentially, a spouse becomes entitled to a separate pension when the member retires. If the member dies before retiring, the spouse is entitled to a share of preretirement survivor benefits payable on the member's death. See s. 55.7(1).

"spouse" means the **spouse** or former **spouse** of a **member** who is entitled to an interest in a **pension** in favour of the **member**, or compensation for foregoing such an interest, under Part 3 of the *Family Relations Act*,

The PBSA defines "spouse" differently. For one thing, the PBSA applies to common law spouses. The draft legislation is supplementary to the property division sections of the FRA, in Part 3. These do not apply to common law spouses. Consequently, the definition in the draft legislation is more restrictive.

"transfer" means, when referring to the payment of a **proportionate share** of the **commuted value** of a **pension** to the credit of a **spouse**, a **transfer** in accordance with the Regulations,

Regulation 9 governs how a transfer is made. Money from a plan is transferred to another plan or annuity to provide the spouse with a pension.

"vested pension" means a **pension** under which a **member** has an unrestricted entitlement, or option of an entitlement, to the payment of **benefits** which will become payable in accordance with the **plan** or applicable legislation.

The PBSA adopts a concept of vesting but does not define it. Once a pension vests, even a member who leaves employment before retiring – who does not elect to have pension entitlement transferred to another plan or, where the option is available, cashed out – will eventually become entitled to a pension. A vested pension is to be contrasted with a non-vested pension and a matured pension. The term "vested pension" is used in the definition of "member."

Application

55.2 (1) Where a **spouse** is entitled to an interest in a **pension** under Part 3 of the *Family Relations Act*,

Section 55.2(1) refers to a spouse who "is entitled" rather than one who "becomes entitled." This wording should trigger the limitation period governing an application by a spouse for a share of family assets under Part 3. As it happens, the limitation period is largely uncertain under current case law, but the amendment ensures that the same degree of uncertainty applies to all family assets.

(a) the **spouse's** share of the **pension**, and

The draft legislation provides the spouse of a member with two complementary rights to a plan.

First, the draft legislation sets out how the spouse will receive an interest in the pension: under an account split, a benefit split, a transfer of a share of commuted value or the payment of compensation.

(b) the manner in which the **spouse's** entitlement in the **pension** is to be satisfied

Second, the spouse may be given some of the status of a member, under s. 55.3, whether the plan is divided by an account split or a benefit split.

is determined in accordance with this Part.

(2) This Part applies only where a **spouse** becomes entitled to an interest in family assets under Part 3

(a) after this Part comes into force, or

(b) before this Part comes into force but there has been no allocation of the **pension** between the **spouse** and the **member**

(i) by agreement, or

(ii) by court order

at the time this Part comes into force.

When marriage breakdown occurs before this Part comes into force, the division of the pension is governed by the former law, with one exception. The new legislation will apply if the issue of pension entitlement is at large. See also s. 55.1(2), which allows the spouse and member to opt into the pension division legislation; and s. 55.8(3) which allows a spouse to request a benefit split be administered by the plan instead of the member.

(3) A court order or an arrangement between the **spouse** and **member** which is silent on **pension** entitlement, but which represents a final settlement and separation of their financial affairs in recognition of the end of their marriage is an allocation of the entire **pension** to the **member** by agreement or court order within the meaning of subsection (2)(b).

The new legislation should not be used to open up settled arrangements. Some court orders and agreements are intended to be comprehensive and final settlements, but they do not necessarily specifically identify all of the assets (such as a pension) owned by the member or spouse. Subsection (3) clarifies that a final settlement may not be reopened even if it does not refer specifically to pension entitlement.

Local plans: Designation of a Limited Member

"Local plan" is to be contrasted with "extraprovincial plan." An "extraprovincial plan" is a plan that cannot be reached by an order of a British Columbia court. Such plans are governed by s. 55.6, and will be divided in accordance with the terms of the plan, or by a benefit split or a compensation order. Neither of these methods directly affects the pension or the plan.

A "local plan" is one that is subject to the order of a B.C. court, and a more direct method of pension division, consequently, becomes available. Defined contribution plans are divided by transferring from the plan a share in favour of the spouse (see s. 55.4). Defined benefit plans are divided by a similar kind of transfer or an account split (see s. 55.5). A different method is adopted if the member has retired at the time of marriage breakdown (see s. 55.8).

55.3 (1) A spouse may be designated to be a **limited member** of a **local plan** by delivering a prescribed Notice to the **plan.**

In some cases, a spouse may have some of the rights of a member of a plan. This is done by making a limited member designation. The manner in which a designation is made is set out in Regulations 6, 7 and 8. The situations in which a limited member designation can be made are listed in Regulation 6.

(2) **A limited member** has the following rights:

(a) to receive from the **plan** direct payment of a **separate pension** or a **proportionate share** of **benefits** paid under the pension, as the case may be, determined under this Part,

Currently, there is no obligation under B.C. legislation on a plan to pay a portion of a pension to a spouse of a member and the courts have no ability to make such an order. In most cases, the member is charged with that responsibility. Subsection (a) alters the current law.

(b) to enforce rights against the **plan** and recover damages for losses suffered as a result of a breach of a duty owed by the **plan** to the **limited member**,

This section corresponds to s. 8(5) and (6) of the PBSA.

(c) except as modified by this Part, to all of the rights of a **member** under the *Pension Benefits Standards Act*, and

The PBSA sets out minimum standards for the protection of members. A limited member should be regarded as a member within the meaning of that Act. Section 55.12 amends a limited member's rights to information from the plan.

(d) such additional rights as are set out in this Part.

(3) Subject to the order of a court, a designation of **preretirement** or **postretirement survivor benefits** under the **member's pension** in favour of a **limited member** may not be changed without the **limited member's** consent until the **limited member** ceases to be a **limited member** or becomes entitled to a **separate pension**.

Preretirement and postretirement survivor benefits payable on the death of a member are paid in lieu of the pension. Unless the spouse and member separately arrange for insurance against the member's death, it is necessary to ensure that the limited member's rights to survivor benefits are protected (the limited member, of course, may agree to give them up in exchange for something else). Where a limited member becomes entitled to a separate pension, there is no longer any need for the limited member to receive survivor benefits under the member's pension. The limited member's pension is unaffected by the member's death. See s. 55.5 and 55.7(2). A spouse might cease to be a limited member in several ways. *E.g.*, limited membership would expire on the spouse's death or by agreement, if the member satisfies the spouse's pension entitlement by making a compensation payment. See also subs. (4).

Survivor benefits include death benefits. See the definitions of preretirement and postretirement survivor benefits.

(4) Where the **commuted value** of the share of a **spouse** in the **pension** is transferred to the credit of the **spouse** under this Part, the **spouse** ceases to be a **limited member** of the **plan**.

S. 55.5 allows a spouse to elect to receive a share of the commuted value of the member's pension (under the Regulations the commuted value is determined in the same manner as if the member terminated employment and applied to have the value of the pension transferred to another plan, etc.). When that happens, the spouse is entitled to no further share of the member's pension. The status of limited member, consequently, ceases.

Regulation 9 governs a transfer from a plan to the credit of a spouse.

Local Plans: Division of an Unmatured Defined Contribution Plan

55.4 If the **pension** to be divided is in a **local plan** and not yet **matured** and the **plan** is a **defined contribution plan**, the **spouse**, upon delivering a prescribed Notice to the **plan**, is entitled to have a prescribed portion of the member's account balance transferred from the **plan**.

Regulation 5 provides for a transfer from a defined contribution plan. Roughly speaking, the spouse's share is calculated as half of the value of the pension accumulated during the marriage. The Regulation also sets out a method for calculating the spouse's share where the value of the pension is not known at the date of marriage. The spouse's share is used to provide the spouse with a pension. Transfers from a plan to the credit of a spouse are governed by Regulation 9.

Local Plans: Division of an Unmatured Defined Benefit Plan By Account Split or Transfer of Commuted Value

This section applies only if (i) the member has not yet retired, (ii) the plan is a defined benefit plan and (iii) the plan is subject to the order of a B.C. court. It allows the pension to be divided either by transferring a share from the plan to another vehicle that will provide the spouse with a pension, or by providing the spouse with a separate pension when the member retires. It is open to the spouse and member to agree on a different form of pension division (such as the payment of compensation in lieu of pension entitlement): see s. 55.10.

55.5 If the **pension** to be divided is in a **local plan** and not yet **matured** and the **plan** is a **defined benefit plan**, the **spouse**, upon delivering the prescribed Notice to the **plan**, is entitled either

The Regulations set out an appropriate form of notice, and stipulate how it must be delivered to the plan, and what is to occur where the member will not cooperate or the plan is not given sufficient information to carry out the division of the pension. See Regulations 6, 7 and 8.

(a) before the member retires, to have a **proportionate share** of the **commuted value** of the **pension** transferred to the credit of the **spouse** from the **plan** at any time the **member** could have **retired**, or

"Proportionate share" and "commuted value" are both defined, and the manner in which they are calculated is set out in the Regulations (see Regulations 1 and 2).

Under the draft Act and the Regulations which follow, the commuted value of a pension is determined in the same manner as if the member terminated employment and applied to have the value of the pension transferred to another plan, etc. The spouse is entitled to have a share of the commuted value paid out (see the definition of "proportionate share.") The PBSA will set out regulations to calculate the commuted value of pensions and benefits. Commuted value is similar to, but not exactly the same idea as, the present value of a benefit, since commuted value is based on determining minimum transfer values where a member wishes to move pension entitlement from one plan to another. Even so, it is useful to tie into the PBSA on this point, and any concern that a spouse is undercompensated by this approach is met by allowing a spouse to defer taking a transfer of a proportionate share of the commuted value of the pension or a benefit. (Most other jurisdictions in Canada that allow pension division adopt this approach but restrict the transfer of entitlement to the date of marriage breakdown.)

If a spouse elects this option, a share of the commuted value is transferred to another plan, etc., in accordance with Regulation 9.

Notice that the spouse cannot make such an election until the earliest date that a member could have decided to retire.

(b) to receive a **separate pension**, determined in accordance with the regulations, from the **plan** when the **member** retires.

A spouse need not have a share transferred from the plan. The alternative is to wait until the member retires and receive the share at that time, in the form of a separate pension administered by the plan. If the share in favour of the spouse is very small, the plan can compel it to be transferred: see s. 55.9.

The form of the separate pension is set out in Regulation 3. It must be a proportionate share based on the pension the member would have received. The spouse may not elect any option but a single life pension. If there is any difference between the age of the spouse and the member, the pension will be adjusted to arrive at an actuarial equivalent amount.

If the member dies before retiring, the spouse's rights are governed by s. 55.7.

Division of an Extraprovincial Pension

55.6 (1) If the **pension** to be divided is in an **extraprovincial plan**, the **spouse** is entitled to receive a **proportionate share** of **benefits** paid under the **pension** until the

(a) death of the **spouse**, or

(b) termination of the **pension**

whichever occurs first, and the **member** is a trustee for the **spouse** of the **proportionate share** of **benefits**.

Plans that cannot be reached by the order of a B.C. court are divided by a benefit split. The terms of such a division are familiar, since they are the current standard for pension division in B.C. The court is empowered to make all appropriate orders "which are necessary, reasonable or ancillary to give effect to the determination" under s. 52. It is open to the spouse and member to agree on a different form of pension division (such as the payment of compensation in lieu of pension entitlement): see s. 55.10.

The form of the pension will determine its duration. *E.g.*, if it is a single life pension, it will end on the death of the member. It may be for the joint lives of the spouse and member, in which case, it will last at the very least for the spouse's lifetime. The court will ordinarily require the member to elect a joint life option, but it is open to the spouse and member to agree on this matter.

Since the plan, by definition, is not subject to an order of a B.C. court, the plan would not be required to make payments directly to the spouse. The member would receive the payments under the pension and be under an obligation to pay to the spouse the appropriate amount.

(2) Notwithstanding a reduction of the **benefits** by reason of the death of the **member**, where **benefits** continue to be paid after the death of the **member** the amount paid to the **spouse** under subsection (1) must not be less than the amount paid before the reduction.

The pension may be based on joint lives, and allow for a reduction on the death of one. While the spouse's share is based on a fraction of the original benefits, it should not be based on the reduced benefits. Ordinarily, the reason for reducing the benefits is that the survivor does not need the entire original amount. A proportionate share of the reduced pension, however, would leave the surviving spouse with too little. The surviving spouse's share should be no less than the amount paid before the member's death.

(3) Subsection (1) does not apply where the **plan** or legislation establishing or regulating the **plan** provides an alternative method of satisfying the interest of the **spouse** in the **pension** unless, having regard to the principles that apply to **pension** division under this Part, the method would operate unfairly, in which case the court may order the **spouse's** share in the **pension** be satisfied under subsection (1).

A plan, or the legislation which regulates it, might provide for division on marriage breakdown. The method set out will apply unless it is unfair.

Death of a Member or Limited Member

55.7 (1) Where the **member** dies before a **limited member** receives a share of the **pension** under section 55.5, the **limited member** is entitled to a **proportionate share** of any **preretirement survivor benefit** payable under the **member's pension**.

A limited member may choose between having part of the pension transferred to another plan, etc., or wait until the member retires to receive a separate pension. If the limited member decides to wait, what happens if the member dies before retiring? The limited member will receive a proportionate share of survivorship or death benefits.

(2) Where the **member** dies after the **limited member** receives a share of the **pension** under section 55.5, the **limited member** is entitled to no further share of the **member's pension** except to the extent that the **member** has designated the **limited member** to be a **beneficiary** of the **pension**.

The policy is clear. Once there is a division of pension entitlement, the financial relationship between the spouse and member, insofar as the pension is concerned, is at an end. A spouse who has received a share of the pension should not receive more on the death of the member.

(3) Where the **limited member** dies before the **member** and before receiving a share of the **pension** under section 55.5, the **plan** must transfer to the credit of the **limited member's** estate a **proportionate share** of the **commuted value** of the **pension**.

The division of the pension is a division of property rights. These rights do not depend upon whether the spouse will live to enjoy them. The deferral of entitlement is a waiting period for the payment of these rights, not a deferral of the property right itself. Consequently, when the spouse dies, the spouse's estate should receive an appropriate share of the pension.

Matured Pensions in Local Plans: Benefit Split

55.8 (1) If the **pension** to be divided is a **matured pension** in a **local plan**, the **spouse**, upon delivering a prescribed Notice to the **plan** designating the **spouse** to be a **limited member**, is entitled to receive from the **plan** a **proportionate share** of **benefits** paid under the **pension** until the

(a) death of the **spouse**, or

(b) termination of the **pension**

whichever occurs first.

Where the member has retired, all elections have been made and, in most cases, a joint life and last survivor pension option will have been selected (the PBSA, in fact, will require this). It is only necessary, consequently, to divide the benefit stream of such pensions, although the spouse and member would be free to agree on a compensation payment instead: see s. 55.10.

The terms of a benefit split are familiar, since they are the current standard for pension division in B.C. The court is empowered to make all appropriate orders "which are necessary, reasonable or ancillary to give effect to the determination" under s. 52.

As a limited member of the plan (see s. 55.3), the spouse would be entitled to receive payments directly from the plan.

(2) Notwithstanding a reduction of the **benefits** by reason of the death of the **member**, where **benefits** continue to be paid after the death of the **member** the amount paid to the **spouse** under subsection (1) must not be less than the amount paid before the reduction.

The pension may be based on joint lives, and allow for a reduction on the death of one. While the spouse's share is based on a fraction of the original benefits, it should not be based on the reduced benefits. Ordinarily, the reason for reducing the benefits is that the survivor does not need the entire original amount. A proportionate share of the reduced pension, however, would leave the surviving spouse with too little. The surviving spouse's share should be no less than the amount paid before the member's death.

(3) A **local plan** that pays a **proportionate share** of **benefits** to a **spouse** must make separate source deductions with respect to income tax liabilities and the like for the **spouse's** share and the **member's** share of the **benefits**.

Spouse and member are separately responsible for the tax liability on their respective portions.

(4) Notwithstanding section 55.2(2), a **spouse** who, before this Part comes into force, is entitled to receive from a **member** payment of a **proportionate share** of **benefits** paid under the **matured pension** may require the **plan** to administer the division under subsection (1) by delivering a prescribed Notice to the **plan**.

The new legislation applies in some cases of pension division settled before it comes into force. This subs. applies if the member has retired and the pension is being divided by a benefit split. If the pension is to be divided by a benefit split administered by the member, spouse and member can also agree to opt into the new legislation where the member is not yet in receipt of benefits under it: see s. 55.10(2). Even if they don't agree, a spouse entitled to share under a pre-existing benefit split can require the plan to administer the division.

Transfer of Commuted Value of a Separate Pension or Share of a Pension

55.9 Where a **limited member** is entitled to a **separate pension** or a **proportionate share** of **benefits** paid under the **pension**, a **plan** may require the **limited member** to accept a transfer of the **commuted value** of the **separate pension** or of the **proportionate share** of the **benefits**, as the case may be, in any case that the plan could have required a **member** to do so.

The amounts involved may be so trivial that it would be inappropriate to require a plan to administer the divided pensions. Section 33(5) of the PBSA allows a plan to make a transfer of commuted value "if the commuted value of the pension does not exceed the prescribed amount." The plan should have a similar right when dealing with a limited member.

Agreements

55.10 (1) A spouse may enter into a written agreement with a member respecting one or more of the following:

If spouses cannot directly agree on these issues, they will make agreements on other issues to adjust the division of property. Consequently, the legislation allows the spouse and member some scope for directly adjusting the division of the pension by agreement.

(a) a revision of the formula for sharing a pension, provided that the share to the spouse does not leave the member with less than half

(i) of the value the pension would have had, or

(ii) of the periodic benefits that would have been paid under the pension on retirement

if there had been no division of the pension between the member and the spouse or any former spouse.

Some limits are placed on the ability of the spouse and member to agree. The legislation requires the member to retain a half interest so that the pension will still function as a pension. It would run counter to social policy to allow a member to convey all, or substantially all, of the pension as a means of settling family property rights.

(b) a waiver by the spouse of any right or interest to share in a member's pension or any benefit under it,

The spouse can waive all entitlements usually in exchange for something else of value. A spouse could also waive specific benefits. E.g., the spouse could give up entitlement to survivorship benefits – which the member wishes to go to a new spouse – in exchange for an assignment of an insurance policy.

(c) a waiver by the spouse of any right or interest to a division of pension entitlement under the *Canada Pension Plan Act*, or

Currently, on marriage breakdown, a spouse is automatically entitled to a division of the member's pension under the Canada Pension Plan. The spouse and member may not agree upon an alternative method of satisfying entitlement unless the province enacts legislation allowing that. Paragraph (c) permits the spouse and member to contract on the issue.

To be effective, the contract must specifically waive entitlement under the *Canada Pension Plan Act*.

(d) the satisfaction of the **spouse's** interest in the **pension** by the payment of compensation in money or money's worth by the **member** to the **spouse**.

Some correspondents felt that the legislation did not clearly provide that spouses could divide a pension by having the member buy out the interest of the spouse, by making a compensation payment. The court has the ability to make such an order under s. 52. The spouse and member can do so by agreement under s. 55.10(b). Subs. (d) makes certain beyond any doubt that a waiver of rights would be in exchange for value.

See subs. (3) on calculating a compensation payment.

(2) Notwithstanding section 55.2(2), where a **spouse** becomes entitled to an interest in family assets under Part 3 before this Part comes into force, and the **pension** is to be divided by providing that the **member** pay the **spouse** a **proportionate share** of **benefits** paid under the **pension** but the **member** has not yet retired or the **spouse** is not yet receiving **benefits**, the **spouse** and **member** can agree to divide the **pension** in accordance with this Part and in that case a prescribed Notice issued pursuant to this Part is as valid as if entitlement to an interest in family assets arose after this Part comes into force, provided the Notice is delivered to the **plan** no later than two years after this Part comes into force.

In most cases, a division of the pension before this Part comes into force will have been by benefit split. Features provided under this Part improve greatly on that form of pension division. Consequently, the spouse and member can agree to opt into the new legislation.

Some provincial plans already provide for a kind of account split. Under some federal plans a transfer of commuted value may have taken place. In some cases,the spouse and member will have settled pension entitlement by the payment of compensation. These kinds of arrangements should not be upset. The ambit of subs. (2) is confined to benefit splits where the member is responsible for dividing the payments under the pension. Once the pension is being divided, however, there is no reason to upset the settled arrangements. Even then, however, it is to the advantage of the spouse and member to have the division carried out by the plan: see s. 55.8 (3).

(3) Where the **spouse** and **member** agree, or a court orders pursuant to section 52, that the **member** will pay compensation to the **spouse** in satisfaction of part or all of the **spouse's** interest in the **pension**, then, unless the **spouse** and **member** otherwise agree or the court otherwise orders, the compensation payment shall be calculated in accordance with the regulations.

The Regulations set out how a compensation payment is calculated, at least as a starting point: see Regulation 13. Of course, the spouse and member can agree on, or the court could order, the payment of a different amount. The standard set out in the regulations is, roughly, the present value of the spouse's entitlement under this Part. See further, the annotation to Regulation 13.

Administrative Costs

55.11 The **spouse** and **member** are responsible for paying to the **plan** a prescribed amount to offset administrative costs incurred by the **plan** in satisfying the share of the **spouse** under this Part, but a **spouse** or **member** who pays more than a half share may recover from the other the additional amount paid.

Systems will be put in place to deal with pension division. There will be start-up costs, but after that the plan's expenses will not be substantial. Regulation 10 sets out the amount that must be paid to a plan. Usually, spouse and member will share the expense voluntarily. If a member is uncooperative, the spouse may initially pay the full amount, and then recover the member's share later in court proceedings.

The amount to be paid varies depending on the kind of plan involved. See Regulation 10

Information from Plan

55.12 A **limited member**, or a **spouse** claiming an interest in a **pension** who has delivered to the **plan** the prescribed Notice, is entitled to prescribed information from the **plan**.

Usually a spouse will require information in order to pursue rights to a pension. This section authorizes a plan to release information to a spouse. See Regulation 12.

Trust of Survivor Benefits

55.13 Where a **spouse** is entitled to a share of **preretirement** or **postretirement survivor benefits** paid to another, the recipient holds them in trust for the **spouse**.

"Preretirement survivor benefits" and "postretirement survivor benefits" are defined.

The trust obligation on the recipient is a familiar feature of current orders dividing pensions by a benefit split.

Division of other kinds of Plans

55.14 (1) If the **pension** to be divided is in a **local plan** and not yet matured and the plan is a **hybrid plan**,

(a) to the extent that the **pension** in the **hybrid plan** is based, or the **member** may choose to have it based, on principles applicable to a **defined contribution plan**, the **pension** must be divided in accordance with the Act and Regulations as if it were in a **defined contribution plan**; and

(b) the remainder of the **pension** must be divided in accordance with the Act and Regulations as if it were in a **defined benefit plan**.

A plan that has the features of a defined contribution plan and a defined benefit plan is divided by components. A plan that lets the member choose a pension based on either contributions or a benefit formula is divided as if it were a defined contribution plan.

If this approach is unworkable for a particular hybrid plan, subs. (2) will provide a solution. If the value of the pension calculated as a defined contribution plan, *e.g.*, is significantly less than its value as a defined benefit plan, the spouse could apply for a different method of division under that subsection.

(2) Where, in the circumstances, the method of division required under this Act and Regulations is inappropriate because of the terms of the **plan**, the court may, notwithstanding the *Pension Benefits Standards Act* or any other Act purporting to limit the jurisdiction of a court to make an appropriate order respecting **pension** entitlement of the **spouse** and the **member** on marriage breakdown, direct an appropriate method of division of the **pension**, and the order of the court is binding on the **plan**.

The court can devise a suitable method of dividing a plan where the approaches set out in the legislation are inappropriate. Under the current law, a court cannot make an order directly affecting a plan so that pension division methods must of necessity be indirect. Under this subs., however, the court's order is binding on a plan, so that nothing restricts a court from ordering, *e.g.*, a division of the pension account itself, if that is appropriate in the circumstances.

Adjustment of Member's Pension

55.15 Where under this Act a **spouse**, or the **spouse's** estate, receives a share of a **member's pension** directly from a **plan**, the interest in the **pension** of

(a) the **member**, or

(b) any person claiming an interest through the **member**

must be adjusted as prescribed.

Carving off from a pension a share in favour of the spouse necessarily requires subtracting from the share available to the member. The Regulations set out how this is to be done: see Regulation 4.

An example of a person claiming through the member would be someone entitled to a survivorship benefit. Where the spouse is entitled to a share of a survivorship benefit, the share of the other recipient must be reduced correspondingly.

Regulations

55.16 The Lieutenant Governor in Council may make regulations on:

Draft Regulations have been prepared. They follow the draft legislation.

(a) methods and assumptions to be followed for the valuation and division of a **pension** and **benefits** at the end of a marriage,

(b) the procedure to be followed by the **spouse**, **member** and **plan** when dividing a **pension** or satisfying a **spouse's** entitlement to a **pension**,

(c) kinds of information a plan must make available to a spouse or **limited member** about a **plan** or **pension** entitlement and times when the information must be provided, and

(d) setting out forms to be used under this Part.

Calculation of Commuted Value

1. Where the Act under sections 55.5(a), 55.7(3), 55.9 or the Regulations requires calculation of the **commuted value** of a **pension** or a portion of a **pension**, it must be determined by reference to the **commuted value** calculated under section 33 of the *Pension Benefits Standards Act* that would have been transferred in favour of the **member** if the **member** terminated employment at the date of the transfer.

The PBSA provides for the transfer of entitlement by a member from one plan to another. The Regulations for calculating the commuted value of this entitlement are convenient to adopt by reference for the purpose of pension division. The legislation sets out when a spouse is entitled to a proportionate share of the commuted value. Calculating the proportionate share is addressed by Regulation 2.

Calculation of Proportionate Share

2. Where the Act under sections 55.5(a), 55.6(1), 55.7(1), 55.7(3), 55.8, or 55.9 or the Regulations requires a determination of a **proportionate share** of a **pension**, a **benefit**, or the **commuted value** of a **pension**, the **proportionate share** must be determined by the following formula:

"Pensionable service" is defined in the draft Act. Each month a member earns pension entitlement adds to the pensionable service.

(a) half of the **pensionable service** accumulated by the **member** from the date of marriage to the date the **spouse** becomes entitled to an interest in family assets under Part 3,

The proportionate share is determined as a ratio of time periods. The numerator is based on pensionable service acquired during the marriage.

divided by

(b) the total **pensionable service** accumulated by the **member** to the date

The denominator is based on all of the months of pensionable service acquired by the member, to the date the spouse receives the share of the pension.

(i) the **spouse's** share is transferred from the **plan**,

(ii) the **spouse** begins to receive a **separate pension**, or

Paragraph (ii) describes an account split. Paragraph (iii) describes a benefit split.

(iii) the **spouse** begins to receive a payment of **benefits** from the **member** or the **plan**

as the case may be.

It is open to the court to vary the proportionate share, just as it can vary any other aspect of property division, under s. 51 of the FRA. See also s. 55.14(2).

Determining a Limited Member's Separate Pension in a Local Defined Benefit Plan

3. A separate pension in favour of **a limited member** under s. 55.5 of the Act must be

A spouse is entitled to a separate pension where, at the time of marriage breakdown, the member has not yet retired, and the pension is in a local plan that is a defined benefit plan. The separate pension becomes payable when the member retires.

(a) a single life **pension,**

The spouse's pension is based on the spouse's life. It is calculated as a proportionate share of the member's pension. See Regulation 2 concerning the determination of a proportionate share.

(b) based on a **proportionate share** of the pension the **member** would have received had there been no division under this Part and had the **member** elected a **pension** in the unadjusted normal form provided under the **plan,** and

The "normal" form of pension is a well understood term. It is the pension that will be paid under the plan if the member makes no election on retirement. See, *e.g.*, s. 35(3), PBSA. This ensures that the pension division scheme is based on values used to establish and fund the pension.

(c) adjusted in accordance with actuarial principles to take into account any difference between the age of the **member** and the **limited member.**

If the spouse is younger than the member the spouse's share is likely, on a statistical basis, to be paid over a longer time than the member's. To protect the plan, consequently, it will be necessary to pay the spouse a slightly smaller periodic amount, determined on an actuarial basis. If the spouse is older, a slightly larger periodic amount would be payable, to arrive at an actuarial equivalent value to the pension in the hands of the member.

Adjustment of a Member's Pension

4. Where a **spouse** or the **spouse's estate** receives under the Act a **separate pension**, a transfer of a **proportionate share** of the **commuted value** of a **pension** or a share of **benefits** under the **pension**, the **plan** shall adjust the **member's pension** or **benefits** under it, as the case may be, by deducting from it the **proportionate share** (before the adjustment specified in Regulation 3(c)) transferred to the credit of, or paid to, the **spouse**.

The member's pension is adjusted after a portion of it has been credited to the spouse (or the spouse's estate: see s. 55.7). The member's pension is reduced by the proportionate share (expressed as a fraction) that the spouse receives.

Transfer of a Share From an Unmatured Pension in a Local Defined Contribution Plan

5. (1) Where a **local plan** that is a **defined contribution plan** is required under the Act to transfer an amount to the credit of a **spouse** of a **member**, the amount is calculated as

(a) half of the contributions made to the **plan** to the credit of the **member** between the date of marriage and the date the **spouse** becomes entitled to an interest in family assets under Part 3, and

(b) **net investment returns** allocated or which are to be allocated in respect of that portion of the contributions until the **spouse's** share is transferred by the **plan**.

This Regulation applies only where the member has not yet retired, and the plan is a defined contribution plan that is subject to the order of a B.C. court. A defined contribution plan is much like a deposit account: it consists of contributions that have been made to it, and earnings from the plan's investments which are allocated to the pension. The value earned during the marriage is divided equally between the spouse and member. The spouse's share will be transferred from the plan, to the spouse's credit, to be used to provide a pension for the spouse. See Regulation 9.

(2) Where the **administrator** can not obtain enough information about the account balance to perform the calculation required under (1), the amount in favour of the **spouse** is calculated as a **proportionate share** of

(a) all of the contributions made to the plan to the credit of the **member** to the date the **spouse** becomes entitled to an interest in family assets under Part 3, and

(b) **net investment returns** allocated or to be allocated in respect of the contributions referred to in paragraph (a) until the **spouse's share** is transferred by the **plan**.

Regulation 2 sets out how to calculate a proportionate share. Not all plans will keep records that will allow the value of a defined contribution plan to be determined as of a past date (such as the date the spouse and member married).

It is to be hoped that defined contribution plans will amend their record keeping once this legislation comes into force.

In the meantime, an alternative method of identifying the spouse's share must be set out. This section follows the approach adopted for identifying the spouse's share of a pension in an unmatured defined benefit plan, or any matured plan.

Designation of Limited Member

6. Under the Act, a **spouse** may be designated a **limited member** of a **plan** where the **pension** to be divided is

(a) an **unmatured pension** in a **local plan** that is a **defined benefit plan**, or

(b) a **matured pension** in a **local plan**.

A limited member designation, under which the spouse acquires some of the attributes of a member, will not be appropriate in every case. This Regulation sets out the situations in which such a designation can be made. There is no need for a spouse to be a limited member where the spouse's share is satisfied by the transfer from the plan of a share of the pension: *e.g.*, if the pension is unmatured and in a defined contribution plan or where the spouse elects that option – see s. 55.3(4) and 55.5. In these cases limited membership is not available.

A spouse can be designated a limited member even if arrangements dividing the pension are in place before the new legislation comes into force. See ss. 55.2(2), 55.8(3) and 55.10(2).

Notice to a Plan

7. (1) Where notice is required to be delivered to a plan

(a) designating a spouse to be a limited member, or

(b) requiring the transfer of a spouse's share of an unmatured pension in a local plan that is a defined contribution plan,

the Notice must be a validly completed Notice in Form A, signed by both the spouse and the member.

Form A must be signed by both spouse and member. In contrast, Form B requires only the spouse's signature. Sample Forms are set out in Appendices C and D.

Where the member will not cooperate, the spouse has a remedy under Regulation 8.

(2) Where notice is required to be delivered to a plan advising a plan that

(a) a spouse who is not a limited member claims an interest in a member's pension,

Form B is used by the spouse to assert an interest or elect an option for pension division.

A spouse may wish to give notice immediately and some time may pass before obtaining the member's signature on Form A, designating the spouse to be a limited member under Regulation 7(1)(a).

Form B allows a spouse to alert a plan to the claim that is being made. A spouse that gives a plan notice in form B is entitled to prescribed information under the Act: see s. 55.12 and Regulation 12.

(b) a limited member elects to have a proportionate share of the commuted value of an unmatured pension in a local plan that is a defined benefit plan transferred to the credit of the limited member, or

Form B is also used once a spouse has been designated a limited member (either by a Form A, signed by both spouse and member, or by court order). A limited member gives a plan notice of a request for a transfer of the spouse's share using Form B. See s. 55.5 and Regulations 1 and 2, concerning the transfer of a proportionate share of the commuted value of a pension.

Regulation 9 governs transfers from plans.

(c) a **limited member** elects to receive a **separate pension** on the retirement of the **member** under a **local plan** that is a **defined benefit plan**

When marriage breakdown occurs before the member retires, the spouse has the option of taking a separate pension from the plan. This election is made by giving the plan notice in Form B.

the Notice must be a validly completed Notice in Form B, signed by the **spouse** or **limited member**, as the case may be.

Where a Member will not Complete a Form A or the Plan will not Comply with the Notice

8. (1) Where the **member** refuses to complete a Notice in Form A as required under the Act, or a **plan** fails to act upon a Notice within 30 days of its delivery, the **spouse** may apply to the court for an order

The Regulations set out forms so that as much of the pension division as possible does not require the supervision of the court. However, where the member or the plan fails to cooperate, for whatever reason, the spouse may apply to the court for an order requiring the appropriate action.

(a) designating the **spouse** to be a **limited member** of a **plan**,

(b) directing a payment out of the **commuted value** of a **spouse's** share from a **defined benefit plan**,

(c) directing the **plan** to create a **separate pension** in favour of the **spouse**,

(d) directing a payment out of a **spouse's** share from a **defined contribution plan** that has not yet **matured**, or

(e) otherwise directing the **plan** to comply with the Notice.

as authorized under the Act.

(2) The administrator of a **plan** affected by the order may apply to set aside or vary the order where either it directs a division of a **pension** that is not authorized under this Part, or does not provide sufficient information to carry out the court's direction.

In most cases, the administrator will simply advise the spouse and member of the problem and they will apply to correct the court order. Where they decline to cooperate, however, the administrator must apply to settle the terms of the order. Costs of such an application will depend upon the success of the parties.

(3) If a Notice is invalid, incomplete or fails to provide sufficient information to carry out the division of the **pension**, the **administrator** must refuse to comply with it by advising both the **spouse** and the **member** of the objection by ordinary mail at the addresses given on the Notice.

There is no obligation on an administrator to abide by an invalid notice, but even so, the spouse and member must be advised of the objection.

(4) Where an application is made to a court pursuant to Regulation 8(1) after a **plan** has refused or failed to comply with a Notice, notice of the application must be given to the **plan**.

The administrator may wish to speak to the application.

(5) Neither the **administrator** nor the **plan** is liable for loss or damage arising in reliance upon an invalid Notice that appeared to be valid.

The onus is on the spouse and the member to look after their interests. There is no liability on the administrator or the plan.

Transfer out from a Plan

9. Where a **plan** is required under the Act to transfer an amount from a **plan** to the credit of a **spouse**, the **plan** must transfer the **spouse's** share to

(a) another **plan** or fund [including a **plan** under the *British Columbia Retirement Savings Plan Act*],

The plan into which the share is paid must satisfy the standards set by the PBSA. These requirements are designed to ensure that the transferred portion is used to provide benefits in the form of a pension.

In the last session of the legislature, a bill was introduced to enact the *British Columbia Retirement Savings Plan Act*, to provide retirement savings for people – such as homemakers – who usually do not belong to pension plans. This bill did not pass third reading before the session was adjourned and it is not known whether government policy on this point will be carried forward. A scheme like this, however, would serve as an ideal vehicle for providing a pension using the funds transferred to the credit of a spouse after a pension division.

(b) a registered retirement savings plan,

The PBSA requires that an RRSP into which pension money is paid must be "locked-in" so that it cannot be used except to provide benefits in the form of a pension.

(c) an insurance company to purchase a deferred or immediate **pension**, or

(d) a different account in the same **plan**

as may be authorized in accordance with section 33(2) of the *Pension Benefits Standards Act*.

Administrative Costs

10. A plan is entitled to the following amounts to offset the administrative costs incurred in dealing with a pension under the Act:

(a) for a defined benefit plan: $400.

(b) for a defined contribution plan: $100.

(c) for a hybrid plan: $500.

In the Working Paper, it was suggested that the plan bear the costs of pension division, but comment on this point was virtually unanimous that the spouse and member should be responsible. Even so, it would not be appropriate to provide that actual costs be deducted from the pension being divided, since there is no mechanism available to ensure those costs are reasonable. The figures set out in the Regulations are based on advice we have received, but this is a matter that could be resolved by the Pension Advisory Committee under the PBSA.

Age at Which Disability Benefits Divided

11. A disability benefit being paid to a member qualifies as a benefit under a matured pension when the member reaches the age of 63.

The age of 63 is selected as an approximate average age of retirement. It is at this time that no distinction can be drawn between various kinds of benefits provided under a plan based on the reason they are being paid. It should be recognized, however, that if the disability benefit qualifies as a family asset, it will be divisible between the spouses before this date. But the mechanism for division set out under this legislation will not be available until the member reaches 63.

Information from Plan

12. (1) A **plan** must provide the following information to a person entitled to prescribed information under the Act within 30 days of a request by the person, no more frequently than once in each calendar year:

(a) any information necessary to value the interest of a **member** in the **pension**, including information on options available to, and elections that may be made by, the **member** with respect to the **pension**, and

(b) any information or notice available to **members** of the **plan**.

A limited member is entitled to prescribed information. So too is a spouse who has given a plan notice in Form B that a claim is asserted to a member's pension. See 55.12 and Regulation 7.

Some plans have no direct contact with members. Information is distributed by each member's employer. Some administrators feel that it would be difficult for a plan to assume responsibility for providing information and inappropriate to place the obligation on a member's employer. The legislation places the onus of requesting information on the spouse or limited member. Such requests are limited to once a year.

(2) A **plan** must give

(a) a **limited member**, or

(b) a **spouse** claiming an interest in a **pension** who has delivered to the **plan** the prescribed Notice,

A plan must advise the spouse or limited member of some significant events that take place. Thirty days notice gives the spouse time to protect rights to the pension, perhaps by obtaining an injunction from the court to preserve matters until proceedings under this Part can be brought.

30 days prior notice of any transaction relating to the **member's** interest in the **plan** by reason of the **member's**

(i) death,

(ii) retirement, or

(iii) direction to the **plan**.

(3) After a **limited member** is in receipt of a **separate pension** under the Act, the **limited member** is entitled to information from the **plan** only about the **separate pension**.

A limited member with a separate pension is no longer concerned about what happens to the member's pension. A spouse who elects to receive a transfer of a share of the commuted value of the pension also ceases to be entitled to notice about the member's share of the pension: see s. 55.3(4).

(4) Where notice is required under this section it must be given by ordinary mail sent to the last address provided by the person entitled to the notice.

Calculation of a Compensation Payment

13. (1) Where the Act under sections 52 or 55.10 or the Regulations provides for the satisfaction of **pension** entitlement by the payment of compensation by the **member** to the **spouse**, subject to the agreement of the **member** and the **spouse**, or the order of a court, it must be a **proportionate share** of a sum of money equalling the present value of the future **pension benefits** payable to the **member**.

The legislation and Regulations set out the mechanics of dividing a pension. An alternative to dividing the pension is for the spouse to accept money or property of equivalent value and leave the member with the pension intact. This option exists currently but, in practise, many issues have arisen concerning how to value pension entitlement. Regulation 13 provides some guidance on valuation. Valuation must take into account future factors that will increase the value of the portion of the pension earned during the marriage, to arrive at an accurate present value of the pension.

(2) A determination of the present value under Regulation 13(1) must make reasonable provision for the following contingencies

(a) the possibility that the **member** may terminate employment or die before **retirement**,

(b) the possibility that the **member** may retire at an early, later or normal **retirement** date,

(c) the possibility that **benefits** being divided as family assets and paid under the **plan** will increase, whether by an automatic formula or on an ad hoc basis, after the date selected for valuing the **benefits**, and

The guidelines for valuation set out here are only a starting point. The spouse and member may agree on a different level of compensation, for any number of reasons. Similarly, a court may find, in the circumstances, that compensation should be calculated on a different basis, which it is empowered to do under s. 52 of the FRA.

(d) to the extent that benefits being divided as family assets are related to future salary levels, the possibility that salary levels will increase after the date selected for valuing the benefits.

(2) Where the pension is not a vested pension at the date of valuation, the spouse may elect either to

(a) postpone valuation until it is ascertained whether the pension vests, or

(b) have the valuation proceed assuming the pension will vest, but adjusting it to take into account the contingency that the member may die or leave employment before vesting.

Employer contributions must be valued if the pension has vested, but until that time the member has no right to them. Whether or not employer contributions are taken into account will substantially affect the value assigned the pension. Under the PBSA, the period required for vesting is reduced. Eventually, a pension will vest within two years of service (although a plan can also defer membership for an additional two years). In these cases, it will not be much of a hardship to wait and see whether the parties are dealing with a vested or non-vested pension. In cases where for some reason matters must be concluded immediately, the pension may be valued based on the probability of vesting according to accepted actuarial principles. It is up to the spouse to select either (i) valuation before vesting, or (ii) postponement of valuation until after vesting.

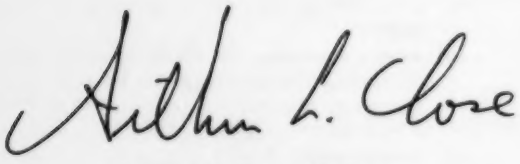
E. Acknowledgements

A number of members of the Commission's legal staff were involved with this project and we would like to take this opportunity to thank them. Jill Turner, Monika Gehlen, Lisa Kirchner and Kirstin Murphy each carried out portions of the research for the Working Paper and earlier discussion drafts. The comprehensive discussion of pension issues in the Working Paper owes a great deal to the quality of their work.

Pension issues turn less on legal questions and more on fundamental principles of the financial structure of pensions and actuarial science. We would have been unable to carry out our work in this field without the careful guidance of an expert. Jim Paterson, of Paterson Pension Management Inc., spent many hours reviewing materials produced by Commission staff and the comments made on the Working Paper and patiently explaining fundamental aspects as well as the finer points of pension plans and pension division. Mr. Paterson is well known to the family bar, having practised extensively in the fields of pensions and pension division. He is also co-author of the Chapter in the *Family Law Agreements Manual* (published by the Continuing Legal Education Society) dealing with pension division and has been a panellist in meetings with subsections of the Canadian Bar Association and a faculty member of CLE Courses dealing with family property issues. We owe a heavy debt of gratitude to him for his valuable assistance in this project. The final recommendations are, of course, the Commission's own.

We would also like to mention the valuable assistance we received from Ian Karp, of Karp Actuarial Services, an actuary who is expert in pension division and also well known to the legal profession for his writing and participation in CLE courses on these issues. Mr. Karp consulted on aspects of the regulations to the pension division legislation, reviewed numerous drafts and offered detailed comments on policy and technical issues. We would like to record our thanks for his contribution.

Finally, we would like to record our indebtedness to the many individuals and groups who considered the Working Paper and took the time to make formal submissions and meet with us to discuss directions for revising the law. The final form of the recommended legislation owes much to the thoughtful advice, comments and constructive criticism we received through this process.



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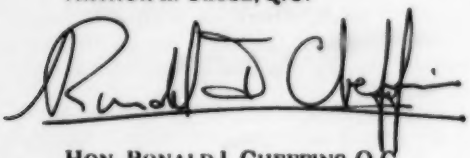

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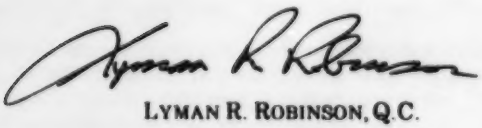

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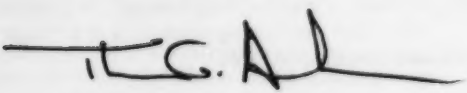

THOMAS G. ANDERSON

APPENDIX A

FAMILY RELATIONS ACT, R.S.B.C. 1979, c. 121

SELECTED PROVISIONS

PART 1

Interpretation and Jurisdiction

Interpretation

1. In this Act

...

"spouse" means a wife or husband and includes

(a) a former spouse for the purpose of proceedings to enforce or vary an order;

(b) where an order for dissolution of marriage, judicial separation, or declaring the marriage to be null and void was made respecting a marriage of a person not more than 2 years before the person applies for an order under this Act, the person making application; or

(c) except under Part 3, a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

PART 3

Matrimonial Property

Equality of entitlement to family assets on marriage breakup

43. (1) Subject to this Part, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement;

(b) a declaratory judgment under section 44;

(c) an order for dissolution of marriage or judicial separation; or

(d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part; or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after this section comes into force.

Declaratory judgment

44. On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

Family assets defined

45. (1) Subject to section 46, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting the generality of subsection (2), the definition of family asset includes

(a) where a corporation or trust owns property that would be a family asset if owned by a spouse,
  (i) a share in the corporation; or
  (ii) an interest in the trust
  owned by the spouse;

(b) where property would be a family asset if owned by a spouse, property
  (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself; or
  (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

(c) money of a spouse in an account with a savings institution where that account is ordinarily used for a family purpose;

(d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan; or

(e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

(4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

Excluded business assets

46. (1) Where property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and where the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 45 (3) (e) or subsection (1), an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

Onus of proof

47. The onus is on the spouse opposing a claim under section 43 to prove that the property in question is not ordinarily used for a family purpose.

Marriage agreements

48. (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after this section comes into force.

(2) A marriage agreement is an agreement entered into by a man and a woman prior to or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

(a) management of family assets or other property during marriage; or

(b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

(3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.

(4) Except as provided in this Part, where a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.

(5) A minor who has capacity to marry has, with the prior consent of the Supreme Court, capacity to enter into a valid marriage agreement.

(6) Where a minor who has capacity to marry has purported to enter into a marriage agreement without the consent required under subsection (5), the Supreme Court may at any time order that the marriage agreement is binding on and is for the benefit of the minor.

(7) In a marriage agreement, a *dum casta* provision applicable where the spouses are living separate and apart is null and void.

(8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.

(9) Where a marriage agreement provides that specific gifts made to one or both spouses are not disposable without the consent of the donor, the donor shall be deemed to be a party to the marriage agreement for the purpose of enforcement or amendment of the provision.

Filing in land title office

49. [omitted]

Enforceability of interest in property

50. (1) In this section "interest of a spouse" means the interest of a spouse arising under section 43, a marriage agreement or a separation agreement.

(2) Section 29 of the *Land Title Act* applies to an interest of a spouse in land.

(3) Where, on the acquisition of property other than land, a person does not have actual notice of the interest of a spouse in the property the interest is not enforceable against that person.

(4) Notwithstanding subsections (2) and (3), the interest of a spouse is enforceable against the other spouse from the date the interest comes into being.

Judicial reapportionment on basis of fairness

51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage;
(b) the duration of the period during which the spouses have lived separate and apart;
(c) the date when property was acquired or disposed of;
(d) the extent to which property was acquired by one spouse through inheritance or gift;
(e) the needs of each spouse to become or remain economically independent and self sufficient; or
(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered by section 43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Determination of ownership, possession or division

52. (1) In proceedings under this Part or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 51, and may make orders which are necessary, reasonable or ancillary to give effect to the determination.

(2) In an order under this section, the court may, without limiting the generality of subsection (1), do one or more of the following:

(a) declare the ownership of or right of possession to property;
(b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
(c) order a spouse to pay compensation to the other spouse where property has been disposed of, or for the purpose of adjusting the division;

(d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;

(e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;

(f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the *Chattel Mortgage Act* or section 19 of the *Sale of Goods on Condition Act*; or

(g) where property is owned by spouses as joint tenants, sever the joint tenancy.

(3) Where the Supreme Court, on application, is satisfied that a spouse has made or intends to make a gift of property to a third person, or has transferred or intends to transfer property to a third person who is not a purchaser in good faith for value, for the purpose of defeating a claim to an interest in the property the other spouse may then or in the future have under this Part, the Supreme Court may make an order under this section to restrain the making of the gift or transfer, or vest all or a portion of the property in, or in trust for, the other spouse.

Interim orders

53. (1) On application by a party to a proceeding under this Part, the court shall make an order restraining another party to the proceeding from disposing of a family asset or any other property at issue under this Part until or unless the other party establishes that a claim made by the applicant under this Part will not be defeated or substantially impaired by the disposal of that family asset or other property.

(2) On application by a party to a proceeding under this Part, the court may make an order for the possession, delivery, safekeeping and preservation of a family asset or other property at issue under this Part.

(3) The court may make an order under this section before notice of the application is served on the other party or may order that notice of the application be served on the other party.

(4) On application by a party to a proceeding under this Part, the court may vary or rescind an order made under this section on terms it considers appropriate.

Variation of marriage settlements

54. (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

(2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.

(3) The Supreme Court may, on application, where circumstances warrant, extend the period during which an application may be made or power exercised under this section.

Application of this Part

55. (1) Where there is a conflict between this Part and the *Partition of Property Act*, or the *Married Woman's Property Act*, this Part prevails.

(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

APPENDIX B

REVIEW OF RECENT PENSION DIVISION CASES

A. Introduction

Part of the preparation of this Report necessarily entailed monitoring cases on pension division decided after the Working Paper was published. A review of recent case law is highly informative.

Many people who commented on the Working Paper argued strongly in favour of retaining a large degree of judicial discretion. It was felt that this was a necessary feature of a system of family property division. Without flexibility, a judge might not be able to divide assets, including the pension, appropriately in the circumstances.

The case law review, however, suggests that some fundamental features of pension division are, in fact, unsettled. The area is one that is so complex that lawyers and judges sometimes have difficulty coming to terms with it. How is a discretion to be exercised if the basic features of pension division are unfamiliar?

The following discussion serves several purposes. It updates the discussion of the law to be found in the Working Paper. It demonstrates that pension issues are difficult to deal with. And it suggests that even twelve years experience with pension division is not enough to settle some basic questions.

B. Terminology

One indication that the law has not been fully worked out is to be found in the way texts deal with it. The Working Paper and this Report have strived for consistency in talking about compensation payments, benefit splits and account splits. There is no point of reference that dictates particular terms to be used for the second and third ideas. Our choices are arbitrary. "Compensation payment," however, is a term that is technically correct since it follows the phrasing in section 52 in Part 3 of the *Family Relations Act*. That section authorizes a court to order the payment of compensation to a spouse for the purpose of adjusting the division of family assets.

Pension division is so new, however, that there are no fixed terms for describing the process. What we call a compensation payment, is elsewhere called a "pension swap,"[1] a "lump sum payment,"[2] a "lump sum division,"[3] a "present cash value method,"[4] and a "valuation and accounting."[5] Probably a few minutes more searching could turn up more alternatives.

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1. *Family Law Agreements Manual* (CLE, 1986) Chapter 14.
2. *Family Law Sourcebook for British Columbia* (CLE, 1990).
3. Karp, "Division of Pension Rights Upon Marriage Breakdown," *Family Issues: Creative Settlement* (CLE, March 8 and 9, 1991).
4. This is a formulation adopted in the United States.
5. Alberta Law Reform Institute.

Similarly, what we call a "benefit split" is elsewhere referred to as a "*Rutherford* Order,"[6] an "if and when" division,[7] a "pension split,"[8] "deferred sharing,"[9] and the "reserved judgment method."[10]

There are many other instances where vocabulary is not tied down. When we talk about an account split, the Canada Pension Plan refers to the division of "unadjusted pensionable earnings" and Manitoba legislation talks about "benefit credits." Account splitting has not generated the same variety of synonyms partly because it is so new.

Benefit splitting orders are often described by courts in terms of years of the member's "contributions," but not all plans are contributory. Actuaries and plan administrators talk instead of "pension entitlement," "years of service" or "accrued pension."

The word "vesting" has a special meaning when used to refer to a pension. When a pension vests, the member will eventually receive a pension, even if the member quits before a retirement age.[11] Lawyers and courts do not always use this word correctly when dealing with pensions because it has a special legal meaning. To most lawyers "vesting" is the time that a person becomes an owner of property or of an interest in it. Some lawyers seem to use the word "vest" to describe a pension after a member retires,[12] which we refer to as a "matured pension."

When even the vocabulary is not tied down, it is not surprising to find other parts of the process unsettled.

C. Methods of Pension Division and When To Choose Between Them

The current law provides really only two methods of dividing a pension. These are the compensation payment and the benefit split.

But these labels give only a hint of the variety of ways courts have used them, perhaps not always properly. The following list does not purport to state that each option is authorized by law. It is simply a list of variations British Columbia courts have applied in the past year or so. Courts have divided a pension through

1. a compensation payment based on contributions to a pension,
2. a compensation payment based on a pension's current values,
3. a compensation payment based on a pension's future values,

---

6. Using this term is often confusing. Some people think a reference to *Rutherford* is a reference to the specific facts of that case, rather than a generic reference to benefit splitting. Moreover, since *Rutherford* dealt with a person who was at retirement age, the order is not as helpful as it might be for a member with years to retire.
7. Karp, *supra*, n. 3; Patterson, *Pension Division and Valuation* (1991).
8. FLAM, *supra*, n. 1.
9. *Supra*, n. 2.
10. This is a formulation adopted in the United States.
11. Or, the member may request the commuted value of the pension to be paid into another financial vehicle for providing pension benefits.
12. This may be how the word is used in the *Rutherford* case.

4. a benefit split based on triggering date values,
5. a benefit split based on trial date values,
6. a benefit split based on a lump sum calculation,
7. a benefit split based on retirement values.

The cases have considered generally when it is appropriate to select a compensation payment over a benefit split. Perhaps the most useful summary is to be found in the recently decided *Syrette* v. *Syrette*,[13] which holds that in the absence of exceptional circumstances – the extreme need of the spouse, the availability of capital, the irresponsibility of the member, the rancour between the spouses – a compensation payment will not be ordered without the consent of the member.

But after that issue is decided, the cases are largely silent on the reason the *particular form* of compensation payment or benefit split is chosen. Indeed, it usually appears that the court was unaware of other mainstream options.

How much of this variety reflects reasonable selections to arrive at a fair division of the pension between the spouses and how much is the result of an incomplete understanding of pension division issues? The following discussion will try to distinguish between the two possibilities.

D. Compensation Payments

A compensation payment is based on a value assigned to the pension. Most recent cases pull the value of a pension out of the air. No reference is made to the expert evidence that must have been led, nor to judicial choices that might have been made between valuations based on conflicting assumptions.[14] This is a matter of some concern because, as indicated in the last section, there are several general ways to calculate a compensation payment, and its value will change dramatically depending on which assumptions are selected. This topic is explored in some detail in Appendix C in the Working Paper.

Should a compensation payment be based on

1. contributions the member made?
2. the value of the pension determined as of the marriage breakdown?
3. a proportional share of the present value of the pension payable when the member retires? or
4. is a court free to choose between these options?

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13. [1991] B.C.D. Civ. 1676-08 (S.C.).
14. *See, e.g., Bazylevich* v. *Bazylevich*, (Unreported B.C.S.C.) *per* Donald J., February, 1991; *Lunden* v. *Lunden*, (Unreported, B.C.S.C.) *per* Prowse J., April, 1990; and *Faulkner* v. *Faulkner*, (Unreported B.C.S.C.) *per* Donaldson J., April, 1991. *Bletcher* v. *Bletcher*, [1991] B.C.D. Civ. 1676-02 (S.C.), is unusual since the case sets out at least some of the assumptions supporting the valuation.

The idea of dividing contributions alone was rejected in 1980,[15] because usually a pension's value is significantly greater than the value of contributions made to it. Even so, recent cases have carried out the division of pensions by dividing the contributions.[16] Possibly there were sound reasons for adopting the approach, but no explanation is offered. In *Zaretzky*,[17] the spouse and member were not represented by legal counsel, which may explain why the method adopted was not one generally accepted in the cases.

Option 2, which bases the compensation payment on values earned to the date of marriage breakdown was approved by the British Columbia Court of Appeal in the *Stokes* case.[18] In our view, this option does not provide a fair valuation.[19] Even so, with the blessing of the British Columbia Court of Appeal one would expect it to be generally applied whenever a compensation payment was required.

Whether that is in fact the case seems doubtful, but little can be deduced from cases which do not tell us how the compensation payment is calculated. In at least one recent case, however, the valuation is based on increases in the pension following marriage breakdown.[20] If any consideration was given to following the *Stokes* option it is not referred to in the judgment. *Stokes* is not mentioned at all.[21]

It is the rare judge that will have an actuarial background, and pension valuation issues are extremely confusing for anyone without the requisite training. Finding inconsistent cases is not surprising. What is unexpected is to find people arguing that a discretionary regime should be left in the hands of people who, by profession, are not trained to deal with the issues.

E. Benefit Split

Similar unexplained differences seem also to arise in the benefit splitting cases. Most cases divide benefits by determining a fractional interest to be credited to the spouse. The spouse's share is then based on the monthly pension benefit that is paid *when the member retires*.[22] There is no need to value the pension to carry out a benefit split, but it is important to set out clear guidelines on the many issues that arise in benefit splitting (for example, should the member continue making payments to the spouse's estate after the spouse's death?) The order made in the *Rutherford* case is a useful guide, but many cases since then have considered more sophisticated issues.[23] Thinking about the necessary terms of an appropriate order has evolved.

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15. *Working Paper on the Division of Pensions on Marriage Breakdown* (W.P. 65, 1990) 31.
16. *See, e.g., Zaretzky* v. *Zaretzky*, (Unreported B.C.S.C.) *per* Boyle J., April, 1991 and, possibly, *Burnett* v. *Burnett*, (1991) 25 A.C.W.S. (3d) 106 (S.C.) (in *Burnett* it is not clear on what basis the pension is valued).
17. *Ibid.*
18. *Stokes* v. *Stokes*, (1986) 8 B.C.L.R. (2d) 80 (C.A.).
19. *See* the discussion in the Working Paper, particularly at 128-9.
20. *Bletcher, supra*, n. 14.
21. The cases concerned different kinds of pensions so that it may be argued that *Stokes* was not binding. Even so, the general principles applied in each case are philosophically at odds.
22. *See, e.g., Leppard* v. *Leppard*, (1991) 26 A.C.W.S. (3d) 993; *Parsons* v. *Parsons*, [1991] B.C.D. Civ. 1676-05 (S.C.).
23. *See, e.g., Strahl* v. *Strahl*, (1985) 60 B.C.L.R. 197 (C.A.).

It is surprising, consequently, to find cases that base a benefit split not on the amount eventually paid to the member, but the monthly amount that would be paid if the member quit the day of the valuation.[24]

Another surprise in the cases are those courts which deal with benefit splitting in a single paragraph, usually indicating a lump sum value for the pension, without any indication of how the value is to be translated into monthly payments when the member retires. These cases usually conclude with the judge stating that the order shall follow the form set out in the *Rutherford* case.[25] If so, the lump sum valuation is a needless expense. The information is of no help whatsoever.

F. Determining the Family Asset

An emerging point of confusion seems to turn on two misconceptions. One relates to the distinction to be drawn between

(a) determining what portion of a pension is a family asset, and

(b) the entirely different process of valuing the pension.

The other point of confusion relates to the distinction between

(a) increases in value with respect to the part of a pension that is a family asset, and

(b) changes in value that represent the addition of new portions to the pension.

Both problems stem from the difficulty of viewing a pension as divisible into portions at all.

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24. *See, e.g., Low* v. *Edgar*, (1990) 28 R.F.L. (3d) 318 (S.C.); *Littleproud* v. *Littleproud*, (1988) 12 A.C.W.S. (3d) 217 (B.C.S.C.); *Zacher* v. *Zacher*, [1991] B.C.D. Civ. 1676-03 (S.C.); and *Fontanella* v. *Fontanella*, (1990) 19 A.C.W.S. (3d) 1355 (B.C.S.C.). It is not always clear what is exactly happening in the case. In *Littleproud, e.g.*, the Judge simply says that the parties agree that payments to wife, when the member retires, should be a specific dollar value. No reason is given why it should not be a specific proportion of whatever the dollar value paid when the member retires. A spouse whose share is based on current values will find that inflation will ordinarily remove much of the value of the pension by the date of retirement. In *Zacher*, the Judge says: "The airline pension will be divided equally between the parties as of the triggering date. The distribution of this family asset should be done in accordance with the legal principles that have come to be known as the *Rutherford* Formula." It is not clear what an "equal division as of the triggering event" means. Is this a reference to the proportionate share? Will it be based on values current when the member retires? Or values determined by reference to the triggering event? The distinction between asset identification and valuation is pursued later in this Appendix. In *Fontanella* the Judge says that the monthly pension payable in eight years is valued at $224.36, but there is no indication of how this value is arrived at. Perhaps it is based on the annual statement, which presumes termination as of the date of the statement. The member in this case had left his employment in 1983. The court then says "It is agreed between the parties that the Microtel pension is to be divided equally." Does this mean half of $224.36 or half of whatever the actual monthly payments are if, *e.g.*, there are any adjustments in benefits?

25. *See, e.g., Lunden, supra*, n. 14. In *Lunden* it was not clear whether the pension would pay out a sum of money to the spouse based on the court's valuation. It is an unusual feature of B.C. law that this is a direction that is often made by the courts, ever since *Rutherford*, whereas, in fact, almost no plans allow for such a transfer. *See also Zacher, supra*, n. 24; *Bletcher, supra*, n. 14.

APPENDIX B

A landmark decision by the Court of Appeal in 1988 resolved many previously doubtful matters, particularly what portion of a pension is to be regarded as a family asset. In *Mailhot*,[26] it was held that all of the pension earned up to the date of marriage breakdown[27] is a family asset and, as a starting point, equally divisible between the spouses. This cleared up years of inconsistent decisions on what portion of the pension should be divided between the spouses. It is entirely consistent with the *Family Relations Act* and the way it deals with family assets generally,[28] but it assumes that pensions do not have any characteristics distinguishing them from other kinds of family assets.

Later courts, unfortunately, seem to have misinterpreted aspects of the decision.

1. Valuation And The Family Asset

The first problem does not really produce unfair results. It is more related to what courts think they are doing when they determine entitlement to a pension.

The court has jurisdiction under s. 51 to reapportion pension entitlement if an equal division of the family asset would be unfair. Courts use a variety of techniques for reapportioning. In many cases, they do not do it directly by, for example, assigning different shares to the spouse or member of the family asset. Instead, they select a valuation date to adjust the division or select a different date for determining the portion of the property that is the family asset (the date of separation, for example, instead of the triggering event).[29]

Courts that refer to the *Mailhot* formula for guidance on selecting a *valuation date* are led astray. The significance of the *Mailhot* decision is not the selection of a valuation date, but the determination of the portion of the pension that is a family asset. *Mailhot* held that the whole of the asset acquired until the triggering event is a family asset and equally divisible between the spouses, even the portion earned before marriage and the portion acquired after separation.[30] It is only after determining what is a family asset that a valuation date becomes important.

Possibly *dicta* in the *Miller* case[31] contributed to the misunderstanding. The court in *Miller* speaks of identifying the portion of the pension that is a family asset as valuation:

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26. *Mailhot* v. *Mailhot*, (1988) 18 R.F.L. (3d) 1 (B.C.C.A.).
27. Marriage breakdown is evidenced by various triggering events identified in the *Family Relations Act*, such as making a separation agreement.
28. This statement should be qualified. As to the treatment of family assets, the position adopted in *Mailhot* is consistent with general principles. However, whether or not a pension *is a family asset* is determined differently from any other kind of asset. *See further* Chapter IV at D and E.
29. *See, e.g., Lye* v. *McVeigh*, (1990) 19 A.C.W.S. (3d) 897 (B.C.S.C.), *aff'd*, (1991) 56 B.C.L.R. (2d) 158 (B.C.C.A.); *Lunden, supra*, n. 14. In each case, the court simply assumed that basing the division on the separation date was correct, but it can be explained as an implicit reapportionment under s. 51.
30. Subject to reapportionment under FRA, s. 51.
31. *Miller* v. *Miller*, (1988) 18 R.F.L. (3d) 424, 430 (B.C.C.A.).

> The question then arises whether the trial judge was correct in excluding the pre-marriage contributions and in valuing the pension at the date of separation rather than at the date of the dissolution of the marriage.

And later:[32]

> It would not be unfair, having regard to that criteria, [under s. 51] that the wife's interest in the husband's pension be valued on the basis that all the contributions made by the husband to his pension be taken into account.

The distinction between asset identification and valuation is clearly drawn by Donald J. in *Bazylevich*:[33]

> As far as pensions are concerned I find that a distinction must be made between the determination of the interest in the asset and its valuation. According to the second point made by Seaton J.A. in the above quotation, the claiming spouse can assert no interest in that part of the pension earned after the triggering event because it is not a family asset. Therefore, the considerations relevant to the selection of the appropriate date of valuation do not come into play. The financial history of the marriage does not bear on the question of what part of the pension is a family asset.
>
> Valuation arises after the family assets have been determined. In the instant case, the parties are agreed that the respondent's interest, whatever it might be, should be valued as of the date of trial. I find that the respondent's interest was fixed on the date of the s. 44 declaration. The respondent should nevertheless be awarded the present day value of the pension determined as of that date.
>
> Mrs. Nash, for the respondent, argues that both valuation and interest determinations can and should take place at the time of the divorce, the later of the two triggering events and the one which produces the fairer result. I am unable to accept that submission...
>
> ...Expert opinion gives the capitalized value of the pension from the date of the triggering event to January 22, 1991 (the date of trial) the sum of $24,190.00. That is the family asset, valued in today's dollars, that should be distributed.

Everything the Judge says is correct. The concluding portion of his observations, however, is obscure. Is the Judge adjusting the triggering event value to express it in trial date dollars? Is that simply an inflation adjustment for the three years from 1988 to 1991? What about earnings on the portion of the pension credited to the spouse?

2. Valuing The Pension

(a) Three Important Dates for Valuation

We introduced this section with the observation that vocabulary is confused. Confusion in vocabulary often translates into misapplication of principle. The mistake some courts make by assuming that the date selected for determining the portion of the family asset is also a valuation date is an example. The misunderstanding is fairly substantial because a pension must be valued by reference to at least two dates and, depending on the valuation date

32. *Ibid.*, 431.
33. *Supra*, n. 14.

selected, a third date. These are the dates: (1) the date the member will probably retire, (2) a date for expressing the lump sum value in present dollars (the trial date, the triggering event, the date of separation or some other date selected by the court) and (3) (where the court has not selected the trial date for valuation) an adjustment to reflect the delay in satisfying the spouse's share in the pension.

(b) The Retirement Date

A pension is an asset whose value is not realized until a future date. Among other issues, assumptions must be made concerning the member's future employment and the date the member will likely choose to retire. Both of these factors will affect the pension's value. Some courts assume that the member leaves employment as of the triggering event, for the purposes of valuation. Some courts assume that the member remains in employment to the date of retirement (actuarial calculations will factor in the prospect of pre-retirement resignation or death). Over the past two years or so, British Columbia courts have stopped telling us which of these directions is taken in valuation. *Dicta* which talks about valuation as of the triggering event suggests that it is assumed that the member terminates employment as of that date, but that may not be the case at all. As mentioned in the last section, the court might simply be referring to the process of identifying the portion of the pension that is a family asset.

The likely date of retirement will also affect a pension's value. The earlier the plan starts paying benefits, the longer their likely duration. Consequently, the earlier the member retires the larger the pension's value (and this holds true in many cases where monthly payments under the pension are reduced as a result of the early retirement). But the cases usually do not reveal what date is being selected to determine the date of retirement.

(c) A Date For Determining the Present Value

In addition to the assumptions that must be made on when (or whether) the member resigns and the date the pension will start paying benefits, the valuation must be made as of a certain date, since the future values must be adjusted so they can be expressed in present day dollars. For that purpose, a number of dates are equally useful. A court can choose the trial date, date of separation or date of the triggering event. Courts vary between these dates in any event.

(d) Taking Delay Into Account

If a date other than the trial date is selected for determining the present value of the pension, there must be a further adjustment. We are dealing in property rights, and inflation is a recognized factor which diminishes real value over time. If pension entitlement is being satisfied as of the trial date, but it has been valued as of an earlier date, either interest must be

awarded on the money, to reflect its late payment, or some adjustment must be made to reflect the change in the property's value.[34] This seems to be what Donald J. is doing in *Bazylevich*. As far as it goes, the decision is impeccable. But we are not told what happens with respect to any issues (some of which are mentioned above) other than the date selected to determine the portion of the pension that is a family asset, the date selected to value the pension, and the adjustment that is made to reflect its payment at a later date.[35]

In *Lunden*,[36] the court followed an entirely different process, again possibly reflecting confusion over identifying the portion of the pension that is a family asset, the selection of an appropriate valuation date, and ensuring that trial date dollars correctly compensate for a past loss:

> With respect to the Teacher's Pension, the value of this pension has increased since the date of separation primarily because of the contributions made by Mrs. Lunden during this period. Because of this fact, I concluded that the property valuation date is the date of separation. Based on the calculations presented in evidence, the value of this pension, at the time of separation was $35,100.

The parties separated in 1987 and the trial took place in 1990. Three years of inflation will have affected the value of the pension, but the court based the division on the out-dated value. The point which should have been made is that even if the value of the pension is growing larger because of further contributions (or increased service), it is also growing because of investments made with past contributions (investment returns protect the value of past contributions). Court orders should take into account increases in value associated with the portion of the pension being divided.[37]

Possibly the reason for some of this confusion is reflected in other *dicta* in *Mailhot*. In the course of the judgment of the Court of Appeal, this passage appears:[38]

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34. Not all courts are equally sophisticated in the principles of awarding interest on court orders: *see, e.g.*, the discussion in the *Report on Court Order Interest Act* (LRC 90, 1987). Even so, there is an increasing awareness that interest performs solely an economic function, usually to compensate for delay in payment and is entirely unrelated to the use the judgment debtor may have put the money to during the interim. It is important to distinguish between delay in payment and entitlement to profits made using the plaintiff's property. In personal injury cases, courts seem to be more comfortable with these ideas than in family property cases. *See, e.g.*, *Billingsley* v. *Billingsley*, (1991) 58 B.C.L.R. (2d) 329, 339 (B.C.C.A.) where the court properly rejected the idea that interest was payable only where the "titled spouse has had the use of liquid funds or property which have themselves earned income." Interest under the *Court Order Interest Act*, R.S.B.C. 1979 c. 76, is paid not because the defendant may have had the use of the money, but because the plaintiff has been denied its use.

35. *E.g.*, we are not told whether it is assumed the member leaves employment as of the valuation date, nor what date the member is considered to retire. For that matter, we are not told whether the adjustment made between the valuation date and the date of trial offsets inflation, or whether there is some investment return assumed as well.

36. *Supra*, n. 14.

37. A simple example to understand the point is an interest bearing bank account. Assume it is a family asset and the court values it as of the triggering event (in this case, 1987). At that time there was $100 in it. Since then the other spouse has deposited another $50. But at trial the account has in it $190, no $150, because interest has been credited to it. The parts of this account correspond to the parts of a pension. The $100 is like the portion of the pension that is a family asset. The $50 is related to service after marriage breakdown and is not divided between the spouses. But something must be done about the remaining $40. Interest earned on the family asset must be divided between the spouses. Similarly, increases in value associated with the portion of the pension that is a family asset must be divided between the spouse and member.

38. *Supra*, n. 26 at 12.

That part of a pension earned or to be earned after the triggering event is not part of the family asset.

The court does not further elaborate on the point. Was it meant that increases attributable to past entitlement should not be taken into account? The issue has not been considered in any later case, and has not been raised anywhere else. One reason that it has not yet been clarified is that lawyers and judges do not have the experience to handle these kinds of economic and actuarial issues.

It might be useful to summarize in terms of the process that we think should be followed: valuing a pension must be based on its future value. The determination of a lump sum requires stating the future value as a present value. Usually a present value represents a sum of money which, if invested, will generate the necessary future funds when they are to become payable. A present value must be calculated as of some date. If it is calculated at a date before it can be invested, there must be some compensation, usually in the form of an adjustment of interest, to take into account the delay in investment. Interest must compensate for the period during which the plaintiff has been kept from the use of the money.[39]

Therefore, the court should either:

1. calculate the present value as of the trial date (bearing in mind that valuation on this basis does not affect the determination of the portion of the pension that is a family asset by reference to an earlier date, such as when the triggering event occurred), or
2. calculate as of the valuation date, but then adjust with a payment of interest to reflect the delay in payment.

3. In The Context Of A Benefit Split

The confusion relating to valuation of compensation payments has spilled over into the field of benefit splits, possibly as a result of the *Mailhot dicta*, or the confusion between asset identification and valuation. For a benefit split, most cases simply come up with the fractional interest of the spouse. Essentially, they are identifying the portion that is the family asset. This fraction is applied when the pension is paid. It is, consequently, based on future pension values. To this extent, benefit split valuation and compensation payment valuation correspond.

There is no need to arrive at a present value calculation, since the spouse is going to wait for payment. Consequently, the remainder of the ad-

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39. This process is familiar in other parts of the law. The *LaRoque* order, for example, recognizes that where postjudgment interest at 5% is paid on a judgment, and the payment of the judgment is deferred until after an appeal, there is a distortion of the basis upon which the award (to compensate for future losses) was originally calculated, since it is assumed that the damages awarded in the judgment will immediately be invested. A market rate of interest must be paid on the judgment to protect its value. Even if the above argument is not clear, it must be clear to everyone that $10 today does not buy nearly as much as $10 did five years ago. The same process at work on a judgment seriously erodes the fair compensation that the court is trying to award. Perhaps courts are tinkering with these aspects of valuation under its jurisdiction to reapportion an award under s. 51. If so, courts should say so expressly, or the appearance exists that awards are being made premised on mistakes.

justments made in compensation payment cases are unnecessary for benefit splits. What do courts mean, then, when they talk about valuing a pension for a benefit split as of the triggering event? Possibly they are simply using the verb "value" as a substitute for a phrase like "identifying the portion of the pension that is a family asset." But some courts are going further and expressly confining the benefit payment to current values.[40] What is happening in those cases where the court is ambiguous on the point? We may not know the answer to that question until the member finally retires. Figuring out how much the member is to pay the spouse will lead to further arguments about what the court ordered.

G. Conclusion

Case law confusion over fundamental concepts is possibly the clearest evidence of the need for revising legislation. Moreover, the complexity of pension issues suggests the need to provide a firm structure for pension division. Those who favour a flexible regime under which the courts enjoy a large discretion for dividing family property should recognize that many courts, by ignoring fundamental issues, have basically delegated that discretion to the actuaries consulted on pension division cases.

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40. Like *Low* v. *Edgar*, *supra*, n. 24.

APPENDIX C

FORM A

Family Relations Act, Part 3.1, R.S.B.C. 1979, c. 121

DIRECTION TO ADMINISTRATOR TO DIVIDE PENSION

To: *(Name and Address of Plan)*

_____
_____
_____
_____

Choose A or B by marking the appropriate box

SELECT ONLY ONE

☐ **A** — The Member's Spouse is designated to be a limited member of the plan.

☐ **B** — This is a direction to transfer the share of the Member's Spouse in the Member's pension to

(Name and address of Pension Plan, Registered Retirement Savings Plan, or Insurance Company)

_____
_____
_____
_____

(Option B calls for a payment out of a lump sum. This option is only available for a defined contribution plan where the member has not yet retired)

Spouse's Name _____
Last name First name Initial

Spouse's Address _____
_____
_____

Member's Name _____
Last name First name Initial

Member's Address _____
_____
_____

Member's Employer Name Address _____
_____
_____
_____

Date of Marriage of Member and Spouse: _____
(Year / Month / Day)

Date of Marriage Breakdown:* _____
(Year / Month / Day)

Have the Member and the Member's Spouse entered into an agreement varying any aspect of the division of the pension? If yes, provide details in a schedule to this form. **No** ☐ **Yes** ☐

Date: _____
(Year / Month / Day)

_____ _____
(Witness's Signature) *(Member's Signature)*

_____ _____
(Witness's Signature) *(Spouse's Signature)*

A DIRECTION TO DIVIDE A PENSION MAY ONLY BE GIVEN TO A PLAN AFTER MARRIAGE BREAKDOWN

**(Date of marriage breakdown is the time the spouse becomes entitled to an interest in the member's pension and is either the date a separation agreement is made between the member and the member's spouse or a date determined by court order: Family Relations Act, s. 43)*

APPENDIX D

Form B

Family Relations Act, Part 3.1, R.S.B.C. 1979, c. 121

CLAIM BY SPOUSE OR LIMITED MEMBER

To: *[Name and Address of Plan]*

_____

_____

_____

_____

FILL IN ONLY SECTION 1 OR SECTION 2
STRIKE OUT THE SECTION THAT DOES NOT APPLY

Section 1 applies only to a spouse who has not been designated a limited member of the plan.

SECTION 1: CLAIM BY A SPOUSE

I _____ (Name of Applicant) am a spouse of the member. I have not been designated a limited member of the plan. I claim an interest in the member's pension.

A Plan that receives this notice must advise a spouse at least 30 days before it takes place of any dealing with the pension that may affect the spouse's interest in it. A limited member is automatically entitled to this notice.

Section 2 applies only to a spouse who is a limited member of the plan

SECTION 2: ELECTION BY A LIMITED MEMBER

I _____ (Name of Applicant) am a limited member of the plan and I direct the Plan as follows:

Choose A or B by marking the appropriate box

SELECT ONLY ONE

A. ☐ Transfer my share of the member's pension to

(Name and address of Plan or Institution that is to receive the transferred share to the credit of the limited member)

_____

_____

_____

_____

Pension entitlement is transferred to another institution. A plan, RRSP, or annuity will provide the spouse with retirement income. A transfer can only be made when a member is allowed to retire.

B. ☐ Pay me a separate pension when the member retires.

The member's plan will provide the spouse with a pension when the member retires.

Spouse's Name and Address	Member's Name and Address	Member's Employer/ Address
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Date: _____ *(Year / Month / Day)*

_____ *(Witness's Signature)*

_____ *(Signature of Applicant)*

APPENDIX E

EXAMPLES OF PENSION DIVISIONS UNDER THE RECOMMENDED LEGISLATION

This Appendix sets out examples of pension divisions, as they would be conducted under the new legislation recommended in this Report, in the following cases:

A. Unmatured pension in a local defined contribution plan

B. Unmatured pension in a local defined benefit plan

C. Unmatured pension in a local hybrid plan

D. Matured pension in a local plan

E. Matured or unmatured pension in an extraprovincial plan

F. Unmatured pension in a local defined benefit plan where the commuted value has been transferred from an earlier plan

G. Member dies before spouse gets share

H. Spouse dies before member retires

Unless otherwise indicated, the examples are based on these facts:

Member is 58		
Spouse is 53		
Member joins pension plan	*(Feb.)*	*1962*
Member marries	*(June)*	*1968*
Spouses separate, s. 44 declaration	*(Dec.)*	*1990*
Trial re: Family Assets	*(Mar.)*	*1992*
Probable date of retirement	*(Mar.)*	*1999*

IN EVERY CASE IT IS OPEN TO THE COURT, OR THE SPOUSE AND MEMBER BY AGREEMENT, TO ADJUST PENSION ENTITLEMENT OR TO HAVE PENSION ENTITLEMENT SATISFIED BY A COMPENSATION PAYMENT

APPENDIX E

A. Division of an Unmatured Pension in a Local Defined Contribution Plan: Section 55.4 and Regulation 5(1)

1. Where The Value Of The Pension At The Date Of Marriage Is Known

Formula: *Half of the value of pension (all contributions plus net investment returns) in 1990 minus value of pension in 1968*

EXAMPLE	
In 1968, the pension was worth	*$8,000*
In 1990, the pension was worth	*$85,000*
In 1992, the pension is worth	*$97,000*

(The values must be adjusted to show investment returns. For the purposes of the example, it is assumed that the contributions to the plan in 1968 have earned $17,000. The contributions in 1990 earned $4,900.)

The spouse would be credited with:

1/2 * ($85,000 + $4,900) - ($8,000 + $17,000) = $32,450

This amount will be transferred to an R.R.S.P or another pension plan in favour of the spouse.

[Member's adjusted share:

$97,000 - $32,450 = $64,550]

(Section 55.15 and Regulation 4)

2. Where The Value Of The Pension At The Date Of Marriage Is Not Known: Section 55.4 And Regulation 5(2)

Where the value of the pension at the date of marriage is not known, there is not enough information to perform the calculations. Instead, the spouse will receive a proportionate share of the current value of the pension.

Formula: Half of (months from date of marriage to date of marriage breakdown in which pension entitlement accrues)

(all months in which pension entitlement accrues to the date of transfer)

Numerator: months from June, 1968 to Dec., 1990
270 months

Denominator: months from Feb., 1962 to (June), 1992:[1]
364 months

The spouse would be credited with:

1/2 * (270/364) * $97,000 = $35,877

This amount will be transferred to an R.R.S.P. or another pension plan in favour of the spouse.

[Member's adjusted share:

$97,000 - $35,877 = $61,123]

(Section 55.16 and Regulation 4)

B. Division of an Unmatured Pension in a Local Defined Benefit Plan [2]

1. Spouse Elects Separate Pension: Section 55.5(b) And Regulations 2 And 3

The spouse will receive a separate pension on the date the member retires.

1. Assuming transfer shortly after trial in March, 1992.
2. The examples below do not mention it but, in some cases, there will be supplemental pensions or bridging benefits. These will be divided in the same way as the principal pension.

Formula: Half of (months from date of marriage to date of marriage breakdown in which pension entitlement accrues)

(all months in which pension entitlement accrues to the date the pension matures)

The proportionate share is calculated in the same manner as under heading A.2, above, but the denominator is determined by reference to the date the spouse starts receiving the pension.

Example:

Numerator: months from June, 1968 to Dec., 1990:
270 months

Denominator: months from Feb., 1962 to Mar, 1999:[3]
445 months

Assume the monthly payment in favour of the member is $889.

The spouse receives:

1/2 * (270/445) * $889 = $269.70 per month.

This amount would be adjusted downward slightly to reflect that fact that the spouse is five years younger than the member and the pension, therefore, is statistically likely to last for a longer period of time than if it were paid to the member.

[Member's adjusted share:

$889 - 269.70 = $619.30 per month]

(Section 55.15 and Regulation 4)

3. This calculation cannot be done until the member's actual retirement date is known.

2. SPOUSE ELECTS TRANSFER OF COMMUTED VALUE: SECTION 55.5(a) AND REGULATIONS 1 AND 2

Assume the commuted value of the pension would be $112,000, if the member left the plan and applied for a transfer of commuted value under the PBSA.[4]

The spouse is credited with a proportionate share of the commuted value.

Formula: Half of (months from date of marriage to date of marriage breakdown in which pension entitlement accrues)

(all months in which pension entitlement accrues to the date of transfer)

The proportionate share is calculated in the same manner as under heading A.2.

Numerator: months from June, 1968 to Dec., 1990:
270 months

Denominator: months from Feb., 1962 to (Dec.)[5] 1992:
370 months

The spouse will be credited with:

1/2 * (270/370) * $112,000 = $40,865

This amount will be transferred to an RRSP or another pension plan in favour of the spouse.

[Member's adjusted share:

100/370 of the pension plus half of 270/370 of the pension = 235/370 of the pension]

(Section 55.15 and Regulation 4)

4. The earliest the spouse can make this election is the first date the member can retire. Assume that is December, 1992.
5. *Ibid.*

C. Unmatured Pension in a Local Hybrid Plan: Section 55.14(1) and Regulations 1, 2, 3 and 5(1)

A hybrid plan may give members a choice between having benefits determined as if the plan were a defined contribution plan or a defined benefit plan (Type 1 Hybrid). In some cases, benefits may be determined by a combined approach: part of the hybrid plan resembles a defined contribution plan, part a defined benefit plan (Type 2 Hybrid).

If the member has an election (Type 1), the plan is divided in the same way as a defined contribution plan under heading A above. Where there is a combined approach (Type 2), the portion that is a defined contribution plan will be transferred in the same fashion as under heading A above.

For example, in a "combined" hybrid plan (Type 2), suppose contributions total $30,000 and not enough information is available to value the pension at marriage. The spouse would be credited with:

1/2 * (270/364) * $30,000 = $11,126

The balance would be determined in the same fashion as under heading B above. Suppose the spouse elects to take the balance in the form of a separate defined benefit pension (like heading B.1 above).

Example:

Numerator: months from June, 1968 to Dec., 1990:
270 months

Denominator: months from Feb., 1962 to Mar, 1999:[6]
445 months

Assume the monthly payment in favour of the member would be $389.

The spouse would be credited with:

1/2 * (270/445) * $389 = $118 per month

---

6. This calculation cannot be done until the member's actual retirement date is known.

This amount would be adjusted downward slightly to reflect the fact that the spouse is five years younger than the member and the pension, therefore, is statistically likely to last for a longer period of time than if it were paid to the member.

[Member's adjusted share:

$18,874 (i.e., $30,000 – $11,126) for the defined contribution account;

under the defined benefit portion:
$271 per month (i.e., $389 – $118)]

(Section 55.15 and Regulation 4)

D. Matured Pension in a Local Plan: Section 55.8 and Regulation 2

The spouse is entitled to a proportionate share of benefits paid under a matured plan.

Formula: Half of (months from date of marriage to date of marriage breakdown in which pension entitlement accrues)

(all months in which pension entitlement accrues to the date the pension matures)

Assume the member's pension is $889 per month.

The spouse receives (directly from the plan):

1/2 * (270/445) * $889 = $269.69 per month.

[Member's adjusted share:

$889 – 269.69 = $619.31 per month]

(Section 55.15 and Regulation 4)

E. Matured or Unmatured Pension in an Extra-Provincial Plan: Section 55.6 and Regulation 2

A spouse's share is satisfied by a benefit split.

A benefit split would be calculated in exactly the same fashion as in D above, except the member would be responsible for paying the spouse the appropriate share.

F. Unmatured Pension in a Local Defined Benefit Plan Where the Commuted Value has been Transferred From an Earlier Plan: Definition of "Pensionable Service"

Facts:	
Member is 58	
Spouse is 53	
Member joins pension plan1	*(Feb.) 1962*
Member marries	*(June) 1968*
Member leaves pension plan1[7]	*(Nov.) 1971*
Member starts job2 and joins pension plan2	*(Mar.) 1972*
Spouses separate, s. 44 declaration	*(Dec.) 1990*
Trial re: Family Assets	*(Mar.) 1992*
Probable date of retirement	*(Mar.) 1999*

1. Spouse Elects Separate Pension: Section 55.5(b) and Regulations 2 and 3

The spouse will receive a separate pension on the date the member retires.

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7. Commuted value of pension1 is transferred to pension2.

Numerator: months from June, 1968 to Nov., 1971, and Mar., 1972 to Dec., 1990: **266 months** (*i.e.*, 41 months + 225 months)

Denominator: months from Feb., 1962 to Nov., 1971, and Mar., 1972 to Mar., 1999:[8] **441 months** (*i.e.*, 117 months + 324 months)

Essentially, the two pensions are treated as a single pension.

Assume the monthly payment in favour of the member is $889.

The spouse's share will be based on a proportionate share of this:

1/2 * (266/441) * $889 = $268.11 per month.

This amount would be adjusted downward slightly to reflect that fact that the spouse is five years younger than the member and the pension, therefore, is statistically likely to last for a longer period of time than if it were paid to the member.

[Member's adjusted share:

$889 - 268.11 = 620.89 per month]

(Section 55.15 and Regulation 4)

2. Spouse Elects Transfer Of Commuted Value: Section 55.5(a) And Regulations 1 And 2

Assume the commuted value of the pension would be $112,000, if the member left the plan and applied for a transfer of the commuted value under the PBSA.

The spouse is credited with a proportionate share of the commuted value.

Numerator: months from June, 1968 to Nov., 1971, and Mar., 1972 to Dec., 1990: **266 months** (*i.e.*, 41 months + 225 months)

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8. This calculation cannot be done until the member's actual retirement date is known.

Denominator: months from Feb., 1962 to Nov., 1971, and Mar., 1972 to (Dec.) 1992:[9]
366 months (*i.e.*, 117 months + 249 months)

Essentially, the two pensions are treated as a single pension.

The spouse will be credited with:

1/2 * (266/366) * $112,000 = $40,699

This amount will be transferred to an RRSP or another pension plan in favour of the spouse.

[Member's adjusted share:

100/366 of the pension plus
half of 266/366 of the pension
= 233/366 of the pension]

(Section 55.15 and Regulation 4)

G. Member Dies Before Spouse Gets Share: Proportionate Share of Preretirement Survivor Benefits: Section 55.7(1) and Regulation 1

Member is 58		
Spouse is 53		
Member joins pension plan	*(Feb.)*	*1962*
Member marries	*(June)*	*1968*
Spouses separate, s. 44 declaration	*(Dec.)*	*1990*
Trial re: Family Assets	*(Mar.)*	*1992*
Probable date of retirement	*(Mar.)*	*1999*
Member dies	*(June)*	*1996*

9. Assuming the member could elect to retire at this date and the spouse elects for the transfer to take place then.

The spouse is credited with a proportionate share of death or survivor benefits (if any).

Example:

Numerator: months from June, 1968 to Dec., 1990:
270 months

Denominator: months from Feb., 1962 to June, 1996:[10]
412 months

Assume the preretirement survivor benefit is in the form of an annuity paying $445 per month:[11]

The spouse receives:

1/2 * (270/412) * $445 = $145.81 per month.

[Member's adjusted share:

If another beneficiary is entitled to share in the death benefit, the share would be calculated as: $445 - 145.81 = $299.19 per month.]

(Section 55.15 and Regulation 4)

H. Spouse Dies Before Member Retires: Section 55.7(3) and Regulations 1 and 2

There will be a transfer to the credit of the spouse's estate of a proportionate share of the commuted value of the member's pension.

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10. Date of *member's* death.
11. Possibly the member might make the spouse the beneficiary and there would be no need to split entitlement. This example is based on the member designating someone else to be the beneficiary, or the plan might automatically provide a preretirement survivor benefit annuity to, *e.g.*, the member's second spouse. Assume that is the case for this example. Because the benefit is to the second spouse, it will only last for that person's life.

Member is 58		
Spouse is 53		
Member joins pension plan	*(Feb.)*	*1962*
Member marries	*(June)*	*1968*
Spouses separate, s. 44 declaration	*(Dec.)*	*1990*
Trial re: Family Assets	*(Mar.)*	*1992*
Probable date of retirement	*(Mar.)*	*1999*
Spouse dies	*(June)*	*1996*

Assume the commuted value of the pension would be $97,000, if the member had applied for transfer of commuted value the day before the spouse's death.

The proportionate share is calculated as follows:

Numerator: **months from June, 1968 to Dec., 1990: 270 months**

Denominator: **months from Feb., 1962 to June 1996:[12] 412 months**

The spouse will be credited with:

1/2 * (270/412) * $97,000 = $31,783

[Member's adjusted share:

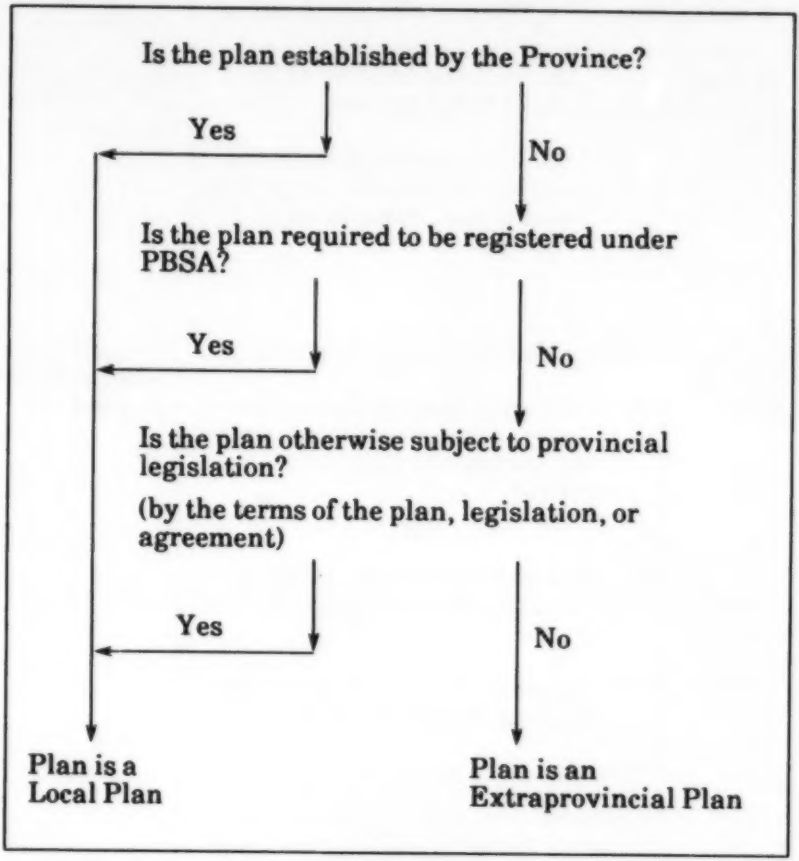
142/412 of the pension plus half of 270/412 of the pension = 277/412 of the pension.]

(Section 55.15 and Regulation 4)

12. Date of spouse's death.

APPENDIX F

DECIDING WHETHER A PENSION IS IN A LOCAL OR EXTRAPROVINCIAL PLAN


Is the plan established by the Province?
Yes
No
Is the plan required to be registered under PBSA?
Yes
No
Is the plan otherwise subject to provincial legislation?
(by the terms of the plan, legislation, or agreement)
Yes
No
Plan is a Local Plan
Plan is an Extraprovincial Plan

DIVIDING AN "EXTRAPROVINCIAL PLAN"

- Divided by methods applied in the plan's jurisdiction (if fair)

Otherwise

- Benefit split administered by member, or
- Compensation payment

APPENDIX F

DIVIDING A "LOCAL PLAN"

Kind of Plan	*If Member Has Not Retired*	*If Member Has Retired*
Defined Contribution Plan	Share is transferred to the credit of the spouse (Half of contributions made to plan during marriage plus half of the investment returns)	Benefit split administered by plan
Defined Benefit Plan	The spouse can choose between: A. A share is transferred to the credit of the spouse as of a date the member can choose to retire* OR B. A separate account, set up by the plan when the member retires (based on a proportionate share of the member's pension) *The amount is a proportionate share of the commuted value of the pension. The commuted value is the transfer value of the pension under the PBSA, and is based on the member leaving employment on the valuation date. The share under Option A. is less valuable than under either Option B. or valuing the pension as a "going concern."	Benefit split administered by plan
Hybrid Plan	Same as Defined Contribution Plan* *If part of the benefits must be determined by a defined benefit formula, that part is divided in the same way as defined benefit plans.	Benefit split administered by plan